NIAGARA HUDSON POWER CORPORATION AND SUBSIDIARY COMPANIES

Consolidated Statement of Income for the Twelve Months Ended March 31, 1948
(As Per Books)

	Consolidated Company and Subsidiaries Nor. Dev. Corp. and UB & PP Corp.	St. Lawrence Power Company, Limited	The Oswego Canal Company	Frontier Corporation	Niagara Hudson Power Corporation	Inter-Company Eliminations	Niagara Hudson Power Corporation and Subsidiaries
Operating Revenues:							
Electric	$114,044,340.74	$638,390.50	$6,726.64	$ —	$ —	$ *11,891.69*(O)	$114,677,566.19
Gas	16,329,614.52	—	—	—	—	*2,895.15*(O)	16,326,719.37
Railway	683,161.11	—	—	—	—	—	683,161.11
Total Operating Revenues	$131,057,116.37	$638,390.50	$6,726.64	$ —	$ —	$ *14,786.84*	$131,687,446.67
Operating Revenue Deductions:							
Operation	$ 57,681,552.99	$385,819.31	$ 161.40	$ —	$ 451,287.84	$ *14,518.64*(O)	$ 58,504,302.90
Maintenance	10,300,678.27	33,326.03	—	—	—	—	10,334,004.30
Depreciation	12,209,845.34	29,080.62	—	—	—	—	12,238,925.96
Provision for:							
Federal income taxes	8,757,800.00	—	1,300.00	—	639,000.00	—	9,398,100.00
Canadian income taxes	534,458.06	75,360.75	—	—	—	—	609,818.81
New York State water charge	1,824,405.00	—	—	—	—	—	1,824,405.00
Other taxes	16,485,749.12	8,590.70	33.64	—	36,749.80	—	16,531,123.26
Emergency diversion reserve appropriation—cr.	*88,890.56*	—	—	—	—	—	*88,890.56*
Total Operating Revenue Deductions	$107,705,598.22	$532,177.41	$1,495.04	$ —	$ 1,127,037.64	$ *14,518.64*	$109,351,789.67
Operating Income	$ 23,351,518.15	$106,213.09	$5,231.60	$ —	$ *1,127,037.64*	$ *268.20*	$ 22,335,657.00
Other Income	*47,331.35*	9,281.14	231.63	*8,892.35*	13,942,106.29	68.20(O) / *13,933,177.99*(P)	*37,514.43*
Gross Income	$ 23,304,186.80	$115,494.23	$5,463.23	*$8,892.35*	$12,815,068.65	*$13,933,177.99*	$ 22,298,142.57
Income Deductions:							
Interest on long-term debt	$ 5,275,464.98	$ —	$ —	$ —	$ 555,255.63	$ —	$ 5,830,720.61
Other interest charges	128,797.91	161.47	1.95	—	513.69	—	129,475.02
Amortization of debt discount and expense	5,904.00	—	—	—	—	—	5,904.00
Amortization of premium on debt—cr.	*78,135.76*	—	—	—	—	—	*78,135.76*
Miscellaneous	*7,262.04*	370.00	—	—	—	288.56	*6,603.48*
Portion of certain charges equivalent to reduction in Federal income taxes attributable thereto	129,000.00	—	—	—	—	—	129,000.00
Total Income Deductions	$ 5,453,769.09	$ 531.47	$ 1.95	$ —	$ 555,769.32	$ 288.56	$ 6,010,360.39
Balance	$ 17,850,417.71	$114,962.76	$5,461.28	*$8,892.35*	$12,259,299.33	*$13,933,466.55*	$ 16,287,782.18
Dividend requirements on preferred stocks of subsidiary companies	2,876,020.24	—	—	—	—	—	2,876,020.24
Net Income	$ 14,974,397.47	$114,962.76	$5,461.28	*$8,892.35*	$12,259,299.33	*$13,933,466.55*	$ 13,411,761.94

NIAGARA HUDSON POWER CORPORATION AND SUBSIDIARY COMPANIES

Income Eliminations

Twelve Months Ended March 31, 1948

		Debit	Credit
(O)			
Operating Revenues—Electric		$ 11,891.69	
Consolidated Company from:			
Niagara Hudson Power Corporation	$5,046.85		
Frontier Corporation	268.20		
The Oswego Canal Company from:			
Consolidated Company	6,576.64		
Operating Revenues—Gas		$ 2,895.15	
Consolidated Company from:			
Niagara Hudson Power Corporation	$2,895.15		
Operating Revenue Deductions—Operation			$ 14,518.64
Niagara Hudson Power Corporation	$7,942.00		
Consolidated Company	6,576.64		
Other Income			$ 268.20
Frontier Corporation	$ 268.20		
To eliminate intercompany revenues and expenses.			
(P)			
Other Income		$13,933,177.99	
Dividends on Common Stocks of subsidiary companies			$13,933,177.99
To eliminate the dividends received by Niagara Hudson Power Corporation on the following companies common stocks:			
Buffalo Niagara Electric Corporation	$ 4,454,992.55		
Central New York Power Corporation	3,994,074.00		
New York Power and Light Corporation	4,420,000.00		
Northern Development Corporation	946,400.00		
St. Lawrence Power Company, Limited	57,711.44		
Union Bag & Paper Power Corporation	60,000.00		
	$13,933,177.99		

[fol. 13] EXHIBIT "B"

For Immediate Release Tuesday, June 8, 1948.

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

Holding Company Act of 1935
Release No. 8246

United States of America, Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the 7th day of June, A. D., 1948

In the Matter of NIAGARA HUDSON POWER CORPORATION

File No. 54-170

(Public Utility Holding Company Act of 1935)

NOTICE OF FILING AND ORDER FOR HEARING ON PLAN FILED PURSUANT TO SECTION 11 (e)

Notice is hereby given that Niagara Hudson Power Corporation ("Niagara Hudson"), a subsidiary of The United Corporation, a registered holding company, has filed an application for approval of a plan, under Section 11(e) of the Public Utility Holding Company Act of 1935, proposing the consolidation of three of Niagara Hudson's principal public-utility subsidiaries into a single operating company.

All interested persons are referred to said application which is on file in the offices of this Commission for a statement of the transactions therein proposed, which may be summarized as follows:

Niagara Hudson owns all the outstanding shares of the common stock of its three principal subsidiaries which are to be consolidated, namely, Buffalo Niagara Electric Corporation ("Buffalo Niagara"), Central New York Power Corporation ("Central New York") and New York Power and Light Corporation ("New York Power").

In general, under the plan it is proposed to consolidate Buffalo Niagara, Central New York and New York Power into the Consolidated Company which initially and temporarily will be named Buffalo Niagara Electric Corporation. Thereafter the name will be changed to Niagara Hudson Power Corporation as soon as that name becomes available.

The outstanding securities of the consolidating corporations as of March 31, 1948, are as follows:

[fol. 13a]

	Buffalo Niagara	Central New York	New York Power
Long Term Debt:			
Funded Debt	$56,360,000	$50,872,000	$48,785,000
Notes Payable	5,000,000	5,511,000	.....
Total Long Term Debt	$61,360,000	$56,383,000	$48,785,000
Capital Stock:			
Preferred Stock—$100 par value 3.60% Series—350,000 shares	$35,000,000	.....	.....
3.40% Series—200,000 shares	.....	$20,000,000	.....
3.90% Series—240,000 shares	.....	.....	$24,000,000
Common Stock—No Par Value			
3,000,000 shares outstanding	22,000,000	.....	.....
1,331,358 shares outstanding	.....	15,244,049	.....
1,300,000 shares outstanding	.....	.....	13,137,107
Total Securities	$118,360,000	$91,627,049	$85,922,107

Under the provisions of the plan all of the long-term debt and liabilities of the three consolidating companies will be assumed by the Consolidated Company.

The plan proposes that the Consolidated Company issue initially an aggregate of 790,000 shares of Preferred Stock, par value of $100 per share, consisting of 350,000 shares of 3.60% of Series, 200,000 shares of 3.40% Series, and 240,000 shares of 3.90% Series, and a presently undetermined number of shares of Common Stock without par value, to have an aggregate stated value of not less than $80,000,000. These shares of Preferred and Common Stocks will be distributed as follows:

(a) Each holder of shares of the Preferred Stock, 3.60% Series, of Buffalo Niagara shall become the holder of one share of the Preferred Stock, 3.60% Series, of the Consolidated Company for each such share held;

(b) Each holder of shares of the Preferred Stock, 3.40% Series, of Central New York shall become the holder of one share of the Preferred Stock, 3.40% Series, of the Consolidated Company for each such share held;

(c) Each holder of shares of the Preferred Stock, 3.90% Series, of New York Power shall become the holder of one share of the Preferred Stock, 3.90% Series, of the Consolidated Company for each such share held.

(d) Niagara Hudson as holder of the Common Stocks of Buffalo Niagara, Central New York and New York Power outstanding at the effective date of the consolidation shall

become the holder of all of the shares of the Common Stock [fol. 13b] of the Consolidated Company initially to be issued in lieu of the shares of Common Stock of Buffalo Niagara, Central New York or New York Power held by it.

Each holder of shares of the Preferred Stocks of Buffalo Niagara, Central New York or New York Power shall further be entitled to receive an amount in cash equal to unpaid dividends accrued on his respective shares of such Preferred Stocks to the effective date of the consolidation.

The plan provides that Niagara Hudson will pay such fees and remuneration for services rendered and make such reimbursement for proper costs incurred in connection with the plan, and the proceedings relating thereto, as the Commission shall finally determine, award, allow or allocate upon petition of any interested person.

The proposed consolidation provided for in the plan is subject to the approval of the Public Service Commission of the State of New York, which adopted a memorandum dated May 5, 1948, indicating that its assent thereto would be forthcoming upon compliance with conditions contained in said memorandum.

The plan is subject to the following conditions:

(1) The plan may be supplemented, amended, modified or abandoned, in whole or in part, by action of the Board of Directors of Niagara Hudson at any time prior to the approval by the Commission. After being approved by the Commission, the plan may be supplemented, amended, modified or abandoned, in whole or in part, by action of the Board of Directors of Niagara Hudson with the approval of the Commission.

(2) The consolidation shall have received the consent thereto of the Public Service Commission of the State of New York.

(3) The Commission shall apply to a court of competent jurisdiction, pursuant to Sections 11(e) and 18(f) of the Act, and such court shall have entered an order finding the plan to be fair and equitable and necessary or appropriate to effectuate the provisions of Section 11 of the Act and directing action to be taken to carry out the terms and provisions of the plan.

(4) The order of the Commission approving the plan shall recite that the transactions of the plan are necessary

or appropriate to the simplification of the structure of the holding company system of which Niagara Hudson is a member, and necessary or appropriate to effectuate the provisions of Section 11(b) of the Act, all in accordance with the meaning and requirements of the Internal Revenue Code, as amended, including Section 1808(f) and Supplement R thereof.

The Commission being required by the provisions of Section 11(e) of the Act, before approving any plan submitted thereunder, to find after notice and opportunity for hearing that the plan, as submitted, or as amended, is necessary to effectuate the provisions of subsection (b) of Section 11, and is fair and equitable to the persons affected thereby; and it appearing appropriate that notice be given and a hearing held with respect to said plan, and that said plan shall not become effective except pursuant to further order of the Commission: [fol. 13c] It is ordered that a hearing under the applicable provisions of the Act and the Rules thereunder be held at 10:00 a.m., E.D.S.T., on June 29, 1948, in the offices of the Securities and Exchange Commission, 425-2nd Street, N.W., Washington, D.C., in such room as may be designated on that day by the hearing clerk in Room 101. In the event that amendments to the plan are filed during the course of said proceedings, no notice of such amendments will be given unless specifically ordered by the Commission. Any person desiring to receive further notice of the filing of any additional plans or amendments should file an appearance in these proceedings or otherwise specifically request such notice. Any person desiring to be heard in connection with this proceeding, or proposing to intervene herein, shall file with the Secretary of the Commission, on or before June 25, 1948, his request and application therefor as provided in Rule XVII of the Rules of Practice of the Commission.

It is further ordered that Richard Townsend, or any other officer or officers of the Commission designated by it for that purpose, shall preside at the hearing in such matter. The officer so designated to preside at such hearing is hereby authorized to exercise all powers granted to the Commission under Section 18(c) of the Act and to a hearing officer under the Commission's Rules of Practice.

The Division of Public Utilities of the Commission having advised the Commission that it has made a preliminary examination of the application and that, upon the basis thereof, the following matters and questions are presented for consideration without prejudice to

its specifying additional matters and questions upon further examination:

(1) Whether the plan, as submitted or as may be amended, is necessary to effectuate the provisions of Section 11(b) of the Act.

(2) Whether the plan, as submitted or as may be amended, is fair and equitable to the persons affected thereby.

(3) Whether the transactions proposed in such plan comply with all the requirements of the applicable provisions of the Act and the Rules promulgated thereunder.

(4) Whether and to what extent the plan, as submitted or as may be amended, should be modified, or terms and conditions imposed, to insure adequate protection of the public interests and the interest of investors and consumers, and to prevent circumvention of the Act and Rules and Regulations thereunder.

(5) Whether the fees, expenses and other remuneration which may be claimed in connection with the plan, and transactions incident thereto, are for necessary services and are reasonable in amount.

It is further ordered that particular attention be directed at said hearing to the foregoing matters and questions.

It is further ordered that the Secretary of the Commission shall serve notice of the aforesaid hearing by mailing copies of this order by registered mail to Niagara Hudson Power Corporation, Buffalo Niagara Electric Corporation, Central New York Power Corporation, New York Power and Light Corporation, and the Public Service Commission of the State of New York, and that notice be given to all other [fol. 13d] persons by general release of the Commission distributed to the press and mailed to the mailing list for releases issued pursuant to the Public Utility Holding Company Act of 1935, and that further notice be given to all persons by publication of this notice and order in the Federal Register.

It is further ordered that Niagara Hudson Power Corporation give notice of this hearing to all holders of the preferred stocks of Buffalo Niagara Electric Corporation, Central New York Power Corporation, and New York Power and Light Corporation (in so far as the identity of such stockholders is known and available to Niagara

Hudson) by mailing a copy of the plan and a copy of this notice and order at least 15 days prior to June 29, 1948, the date of said hearing.

By the Commission.

Orval L. DuBois, Secretary. (Seal.)

[fol. 14] EXHIBIT "C"

For Immediate Release Monday, January 24, 1949

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C.

HOLDING COMPANY ACT OF 1935

Release No. 8798

UNITED STATES OF AMERICA, BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the 19th day of January, A. D., 1949.

In the Matter of NIAGARA HUDSON POWER CORPORATION. File Nos. 54-170, 54-172. (Public Utility Holding Company Act of 1935)

NOTICE OF FILING AND ORDER FOR HEARING AND FOR CONSOLIDATION

Notice Is Hereby Given that Niagara Hudson Power Corporation ("Niagara Hudson"), a registered holding company, and a subsidiary of The United Corporation, also a registered holding company, has filed an application for approval of a plan ("Dissolution Plan"), under Section 11 (e) of the Public Utility Holding Company Act of 1935, providing for the dissolution of Niagara Hudson, and submitted for the stated purpose of enabling Niagara Hudson to comply with Section 11 (b) of the Act (File No. 54-172).

All interested persons are referred to said application, which is on file in the offices of this Commission, for a statement of the transactions therein proposed. There are summarized below certain aspects of the prior proceedings concerning Niagara Hudson and its subsidiaries together with the Dissolution Plan:

The Commission by order dated October 4, 1945, approved a plan filed by Niagara Hudson and its subsidiary, Buffalo, Niagara and

Eastern Power Corporation, providing, among other things, for the disposition by Niagara Hudson, within one year from November 1, 1945, of all of its interest, direct or indirect, in Buffalo Niagara Electric Corporation (File No. 54-106, 54-107, 59-52). The time for compliance with that order has been extended to May 1, 1949, by subsequent orders of the Commission.

There is presently pending before the Commission a plan filed by Niagara Hudson under Section 11 (e) of the Act ("Consolidation Plan") providing for the consolidation of its three principal subsidiaries, namely, Buffalo Niagara Electric Corporation, Central New York Power Corporation and New York Power & Light Corporation, into a single electric and gas operating company ("new operating company") (File No. 54-170). Under the provisions of the Consolidation Plan all of the long-term debt and liabilities of the three consolidating companies would be assumed by the new operating company, the outstanding shares of preferred stocks of the three consolidating companies would be exchanged for shares of preferred stock of the new operating company, and the common stock of the new operating company would be received by Niagara Hudson in exchange for its present holdings of all the common stocks of the consolidating corporations. Hearings were held on the Consolidation Plan and have been continued subject to the call of the hearing officer.

[fol. 14a] The Dissolution Plan now proposed by Niagara Hudson is expressly conditioned upon prior consummation of the pending Consolidation Plan, and upon specified findings to be made and other action to be taken by the Commission and an appropriate District Court of the United States.

Niagara Hudson's outstanding securities at December 1, 1948, were as follows:

Notes payable to banks (due 1948-1950)	$22,870,000
First preferred stock, 5% Series $100 par value, 378,875 shares	37,887,500
Second preferred stock, 5% Series A—$100 par value, 90,281 shares	9,028,100
Second preferred stock, 5% Series B—$100 par value, 15,649 shares	1,564,900
Common stock, $1 par value—9,580,988—½ shares	9,580,988.50

In addition to the above securities Niagara Hudson has outstanding Class B stock option warrants entitling the holders thereof to purchase 497,191-3/6th shares of common stock at $50 for 1-1/6th shares at any time without limit.

Pursuant to the terms of the Dissolution Plan, the charter of the new operating company would be amended to reclassify its common stock to be outstanding after consummation of the Consolidation Plan into 1,939,220 shares of Class A stock and 7,473,172 shares of common stock, each without par value. Subject to the prior rights of the new operating company preferred stock, the shares of Class A stock would have preference as to, and be limited to, cumulative dividends of $1.20 per share per annum, and no dividends would be payable and no other distribution would be made on the common stock unless all dividends on Class A stock have been paid or set aside for the current, and all past, quarterly dividend periods. Each share of the Class A stock would be convertible at the option of the holder into 1-1/10th shares of common stock of the new operating company during the first three years following the effective date of the plan and into 1 share of common stock during the succeeding three years, after which six-year period the conversion privilege would terminate. Upon termination of the initial three year conversion privilege, the Class A stock would thereafter be redeemable at the option of the new operating company, as a whole or in part, at any time, or from time to time, at $26.875 per share plus accrued dividends to the redemption date.

Under the terms of the Dissolution Plan, all the outstanding preferred stock of Niagara Hudson would be exchanged for shares of Class A stock of the new operating company in the ratio of 4 shares of Class A stock for each share of the preferred stock of Niagara Hudson. The shares of Class A stock to which holders of preferred stock of Niagara Hudson become entitled would be surrendered to the new operating company if unclaimed by such preference stockholders at the expiration of ten years from the effective date of the Dissolution Plan.

The Dissolution Plan provides that following the effective date thereof, Niagara Hudson would offer to exchange common stock of the new operating company for common stock of Niagara Hudson upon the basis of .78 shares of common stock of the new operating company for one share of Niagara Hudson common stock plus a ratable amount of cash per share of Niagara Hudson common necessary to pay off the bank loan of Niagara Hudson outstanding at the effective date of the Dissolution Plan. It is estimated that, as of February 1, 1949, such cash amount would be approximately $2 per share. The exchange offer would remain open for a period of six months from the effective date of the Dissolution Plan. Cash received in the exchanges would be applied to the payment of the unpaid principal of Niagara Hudson's bank loan.

[fol. 14b] The Dissolution Plan further provides that subject to further approval by the Commission and upon adequate notice to common stockholders, Niagara Hudson would dispose of all its interest in the common stock of the new operating company not distributed pursuant to the exchange offer in an appropriate manner not more than two years after the effective date of the Dissolution Plan unless such period is extended by the Commission. When the bank loan has been paid, Niagara Hudson would distribute the remaining shares of common stock of the new operating company, pro rata, to the holders of common stock of Niagara Hudson and thereafter would dissolve.

Under the terms of the Dissolution Plan, no dividends would be declared or paid on the common stock of Niagara Hudson until the bank loan has been paid.

Holders of common stock of Niagara Hudson or of Class A stock of the new operating company, upon being entitled under the Dissolution Plan to receive fractions of a share of common stock of the new operating company, would receive in lieu thereof transferable scrip, exchangeable free of charge for full shares of common stock of the new operating company, but only when presented in amounts aggregating one or more full shares on or before June 30, 1955. Thereafter any shares represented by outstanding scrip certificates would be sold and the proceeds thereof held without accountability for interest for the account of the holders of the scrip certificates for a further period of two years, after which all unsurrendered scrip certificates would become void.

The Dissolution Plan states that no provision is made, or is contemplated to be made, by Niagara Hudson in respect to the outstanding Class B stock option warrants which are deemed by Niagara Hudson to be without present or reasonably potential value and that all rights of such warrant holders would cease and terminate as of the effective date of the Dissolution Plan.

Prior to the effective date of the Dissolution Plan, Niagara Hudson would cause all of its investments except common stock of the new operating company to be transferred to the new operating company.

The Dissolution plan provides that Nigara Hudson would pay such fees and remuneration for services rendered and make such reimbursement for proper costs incurred in connection with the plan and the proceedings relating thereto as the Commission shall finally determine, award, allow or allocate upon petition of any interested person.

The Commission being required by the provisions of Section 11 (e) of the Act, before approving any plan submitted thereunder, to find, after notice and opportunity for hearing, that the plan, as submitted

or as amended, is necessary to effectuate the provisions of Subsection (b) of Section 11 of the Act and is fair and equitable to the persons affected thereby; and

It appearing appropriate that notice be given and that a hearing be held with respect to the Dissolution Plan, and that said plan shall not become effective except pursuant to further order of the Commission; and

It further appearing to the Commission that the matters involved in the pending proceeding on the Consolidation Plan (File No. 54-170) are related to the matters to be considered in the proceeding with respect to the Dissolution Plan (File No. 54-172) and there are common [fol. 14c] questions of law and fact in the two proceedings which would make it desirable that evidence in each matter stand as evidence in the other for all purposes:

It Is Ordered that the proceeding with respect to the Consolidation Plan (File No. 54-170) and the proceeding with respect to the Dissolution Plan (File No. 54-172) be, and the same hereby are, consolidated without prejudice, however, to the Commission's right upon its own motion, or the motion of any interested party, to separate, either for hearing, in whole or in part, or for disposition, in whole or in part, any of the issues, questions or matters included in these proceedings, or to consolidate with these proceedings other filings or matters pertaining thereto, or to take such other action as may appear necessary to an orderly, prompt, and economical disposition of the issues and matters involved.

It Is Further Ordered that a hearing in the consolidated proceedings under the applicable provisions of the Act and Rules thereunder be held on March 1, 1949 at 10 a.m., E. S. T., in the offices of the Securities and Exchange Commission, 425 2nd Street, N. W., Washington 25, D. C., in such rooms as may be designated on that day by the hearing room clerk in Room 101. In the event that amendments to such plans are filed during the course of said proceedings, no notice of such amendments will be given unless specifically ordered by the Commission. Any person desiring to receive further notice of the filing of any additional plans or amendments should file an appearance in these proceedings or otherwise specifically request such notice. Any person desiring to be heard in connection with the consolidated proceedings, or proposing to intervene herein, shall file with the Secretary of the Commission, on or before February 25, 1949, his request and application therefor as provided in Rule XVII of the Rules of Practice of the Commission.

It Is Further Ordered that Richard Townsend, or any other officer or officers of the Commission designated by it for that purpose, shall preside at the hearing in the consolidated proceedings. The officer so designated to preside at such hearing is hereby authorized to exercise all powers granted to the Commission under Section 18 (c) of the Act and to a hearing officer under the Commission's Rules of Practice.

The Division of Public Utilities of the Commission having advised the Commission that it has made a preliminary examination of the applications and that, upon the basis thereof, the following matters and questions are presented for consideration, in addition to those matters and questions set forth in the Commission's Notice of Filing and Order for Hearing dated June 7, 1948 (Holding Company Act Release No. 8246), with respect to the Consolidation Plan, without prejudice to its specifying additional matters and questions upon further examination:

(1) Whether the Dissolution Plan as submitted by Niagara Hudson, or as it may be amended, is necessary to effectuate the provisions of Section 11 (b) of the Act and is fair and equitable to the persons affected thereby.

(2) Whether the proposed issuance of Class A stock is necessary or appropriate to the economical and efficient operation of the business of the new operating company, whether such Class A stock would be reasonably adapted to the security structure and earning power of the new operating company, and whether the terms and conditions of its issue and sale would be detrimental to the public interest or the interest of investors or consumers.

[fol. 14d] (3) Whether, in the light of the proposals contained in the Dissolution Plan, the distribution of securities to the security holders, (particularly to the holders of the preferred stocks), of Buffalo Niagara Electric Corporation, Central New York Power Corporation and New York Power & Light Corporation provided for in the Consolidation Plan, is fair and equitable.

(4) Whether the proposed distributions in respect of the outstanding stocks of Niagara Hudson and the proposed cancellation, without compensation, of the outstanding option warrants of Niagara Hudson are fair and equitable to the holders of such securities.

(5) Whether the distribution to and the acquisition by The United Corporation and The United Gas Improvement Company of securities of the new operating company satisfies the applicable requirements of the Act, and what, if any, terms and conditions should be imposed in respect thereto.

(6) Whether the fees, expenses and other remuneration which may be claimed in connection with the consolidated proceedings are for necessary services and are reasonable in amount.

(7) Whether the accounting entries proposed to be made in connection with the transactions proposed in the consolidated proceedings are adequate and proper and in conformity with sound accounting principles and meet the applicable standards of the Act.

(8) Whether the transactions proposed in connection with the Dissolution Plan comply with all the requirements of the applicable provisions of the Act and Rules thereunder.

(9) Whether and to what extent the Dissolution Plan should be modified and terms and conditions imposed to assure adequate protection of the public interest and the interest of investors and consumers and to prevent the circumvention of the provisions of the Act and Rules thereunder.

(10) Whether the Dissolution Plan, as submitted or as modified, or a plan proposed by the Commission, or any plan filed by any person having a bona fide interest in the reorganization, should be approved by the Commission for the purpose of Section 11 (d) and, if proposed by the Commission or a person having a bona fide interest, what the terms and provisions of such plan should be.

It Is Further Ordered that particular attention be directed at said hearing to the foregoing matters and questions in addition to the issues and questions set forth in the Commission's Order of June 7, 1948.

It Is Further Ordered that the Secretary of the Commission shall serve notice of the aforesaid hearing by mailing copies of this Order by registered mail to Niagara Hudson Power Corporation, Buffalo Niagara Electric Corporation, Central New York Power Corporation, New York Power & Light Corporation, The United Corporation, The United Gas Improvement Company, and the Public Service Commission of the State of New York, and that notice be given to all other persons by general release of the Commission distributed to the press and mailed to the mailing list for releases issued pursuant to the Public Utility Holding Company Act of 1935, and that further notice be given to all persons by publication of this Notice and Order in the Federal Register. [fol. 14e] It Is Further Ordered that Niagara Hudson Power Corporation give notice of this hearing to all holders of its preferred stocks, common stock and Class B stock option warrants and to all holders of the preferred stocks of Buffalo Niagara Electric Corporation, Cen-

tral New York Power Corporation and New York Power & Light Corporation (in so far as the identity of such security holders is known and available to Niagara Hudson) by mailing a copy of the Dissolution Plan and a copy of this Notice and Order at least 20 days prior to March 1, 1949, the date of said hearing.

By the Commission.

Orval L. DuBois, Secretary. (Seal.)

FINDINGS AND OPINION

OF THE

SECURITIES AND EXCHANGE COMMISSION

AS TO PLANS OF

NIAGARA HUDSON POWER CORPORATION

PURSUANT TO SECTION 11(e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

for

(1) The consolidation of its subsidiaries, Buffalo Niagara Electric Corporation, Central New York Power Corporation and New York Power and Light Corporation, into a single electric and gas operating company, and

(2) Niagara Hudson Power Corporation to cease to be a holding company and to dissolve.

August 16, 1949

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C.

HOLDING COMPANY ACT OF 1935
Release No. 9270

In the Matter of NIAGARA HUDSON POWER CORPORATION File Nos. 54-170 54-172 (Public Utility Holding Company Act of 1935)	FINDINGS AND OPINION OF THE COMMISSION

SIMPLIFICATION OF HOLDING COMPANY SYSTEM

Plan Under Section 11 (e)—Necessity

Plans filed under Section 11 (e) of the Act by registered holding company providing for consolidation of its three direct subsidiary operating companies, the issuance to holders of preferred stock of such subsidiaries of preferred stock of the new consolidated operating company, the issuance to the holding company's preferred stockholders of new company callable Class A stock having preference as to dividends and convertible into common stock of the new company, the issuance of new company common stock to the holding company common stockholders, and the ultimate dissolution of the holding company, *held*, necessary to effectuate the provisions of Section 11 (b), if amended to include certain protective and other provisions respecting the Class A stock.

Plans Under Section 11 (e)—Fairness

Allocation under Section 11 (e) plans of securities of new consolidated operating company to preferred stockholders of direct subsidiary companies being consolidated and to first and second preferred and common stockholders of holding company, *held*, fair and equitable to all security holders affected if amended to reduce slightly the allocation to second preferred stockholders of the holding company in relation to its first preferred stockholders so as to reflect the difference in position of those two classes of stockholders.

APPEARANCES:

RANDALL J. LEBOEUF, JR., WILLIAM N. MASON and LAUMAN MARTIN, of LeBoeuf & Lamb, for Niagara Hudson Power Corporation.

RICHARD JOYCE SMITH and WILLIAM R. SHERWOOD, of Whitman, Ransom, Coulson & Goetz, and JOHN J. BURNS, for The United Corporation.

CHARLES E. SCRIBNER, of Scribner & Miller, for Committee for the First Preferred Stock of Niagara Hudson Power Corporation.

WILLIAM CLARKE MASON, THOMAS B. K. RINGE, and JOHN P. BRACKEN, of Morgan, Lewis & Bockius, and GARFIELD SCOTT, for The United Gas Improvement Company, a holder of Niagara Hudson Power Corporation First Preferred Stock.

MARTIN TAYLOR and PAUL D. NULLE, for Bankers Trust Company of New York, Trustee, holder of Niagara Hudson Power Corporation First Preferred Stock.

JOHN N. WORCESTER and ROBERT B. LUICK, of Sullivan & Worcester, for State Street Investment Corporation, Niagara Share Corporation, and The Lehman Corporation, holders of Niagara Hudson Power Corporation Common Stock.

MORRIS L. FORER, of Wolf, Block, Schorr and Solis-Cohen, for David J. Greene, holder of Niagara Hudson Power Corporation Common Stock.

JUDAH ADELSON, a holder of Niagara Hudson Power Corporation Common Stock, *pro se*.

EUGENE ZIMMERMAN, for certain holders of Class B Option Warrants of Niagara Hudson Power Corporation.

IRA N. LANGSON, for Cowen & Company.

N. VICTOR LEVENTRITT, a holder of Class B Option Warrants of Niagara Hudson Power Corporation, *pro se*.

HARRY G. SLATER, WILLIAM R. NOWLIN, MYRON S. ISAACS, and HERBERT D. MILLER, for the Division of Public Utilities of the Commission.

I. INTRODUCTION

Niagara Hudson Power Corporation ("Niagara Hudson"), a registered holding company and a subsidiary of The United Corporation ("United"), also a registered holding company, has filed two plans pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 ("the Act"). The first plan ("the Consolidation Plan") provides for the consolidation of Niagara Hudson's three principal subsidiaries, Buffalo Niagara Electric Corporation ("Buffalo Niagara"), Central New York Power Corporation ("Central New York"), and New York Power and Light Corporation ("New York Power"), into a single electric and gas utility company ("the New Operating Company"). The second plan ("the Dissolution Plan") is conditioned upon consummation of the Consolidation Plan and provides for the reclassification of the initially issued common stock of the New Operating Company, all to be held by Niagara Hudson, into Class A convertible stock and common stock, the exchange of the Class A stock for the outstanding preferred stocks of Niagara Hudson, the exchange of New Operating Company common stock for Niagara Hudson common stock under certain conditions, and the ultimate dissolution of Niagara Hudson.

After appropriate notice public hearings were held in June 1948 on the Consolidation Plan. In January 1949, following the filing of the Dissolution Plan in December 1948, the proceedings with respect to the two plans were consolidated and, after appropriate notice, public hearings were held in the consolidated proceedings. United was granted leave to intervene as a party, and leave to participate was granted to various holders of Niagara Hudson securities and to a committee representing holders of Niagara Hudson first preferred stock ("the Committee"). After the close of the hearings, the Division of Public Utilities of the Commission ("the Division") and other parties and participants filed proposed findings, briefs and reply briefs, and we heard oral argument.

On the basis of our independent consideration of the record and of the proposed findings, briefs and arguments of all of the parties and participants, we make the following findings.

II. DESCRIPTION OF THE COMPANIES

The original Niagara Hudson Power Corporation, formed in 1929, was a holding company with direct and indirect interests in nearly all of the properties comprising the present Niagara Hudson system. The present Niagara Hudson, also a holding company, was organized in 1937 as a New York corporation upon the consolidation of its predecessor with a subsidiary holding company, Mohawk Hudson Power Corporation.

Niagara Hudson owns all the common stock of its three principal subsidiaries, Buffalo Niagara, Central New York, and New York Power, which are to be consolidated pursuant to the Consolidation Plan. In addition, it directly or indirectly owns all the voting securities of seven other corporations.

The following table shows the various subsidiaries of Niagara Hudson, all but two of which are incorporated in the State of New York, the percentage of their respective voting securities owned, and the nature of their business.

TABLE I

	Percentage of Voting Power	Nature of Business
Niagara Hudson Power Corporation		Holding Company
Buffalo Niagara Electric Corporation	100.0	Holding Company & Electric Utility
The Niagara Falls Power Company	100.0	Holding Company & Electric Utility
Canadian Niagara Power Co., Limited[a]	100.0	Electric Utility
Central New York Power Corporation	100.0	Electric & Gas Utility
New York Power & Light Corporation	100.0	Electric & Gas Utility
Union Bag & Paper Power Corporation[b]	100.0	Owns water rights and hydro-electric plants
Old Forge Electric Corporation[b]	100.0	Electric Utility
The Oswego Canal Company	100.0	Owns & leases water rights
Frontier Corporation	100.0	Owns real estate
St. Lawrence Power Company, Limited[a]	100.0	Electric Utility
Moreau Manufacturing Corporation	33⅓	Owns hydro-electric plant

[a] Incorporated in Canada.

[b] The merger of Union Bag & Paper Power Corporation into New York Power, and the merger of Old Forge Electric Corporation into Central New York, have been approved by the New York Public Service Commission. Proceedings in connection with both mergers are now pending before us.

Buffalo Niagara, Central New York and New York Power render electric service to the public in an area in the upper portion of New York State having a total population of approximately 2,750,000, including such cities as Buffalo, Niagara Falls, Syracuse, Utica, Schenectady, Albany and Troy. The electric properties of the three corporations are interconnected, and the electric properties of Buffalo Niagara are also interconnected with those of its subsidiaries, The Niagara Falls Power Company ("Niagara Falls") and Canadian Niagara Power Company, Limited. Central New York and New York Power also render gas service to the public in an area in the central and eastern portions of the system's area having a population of approximately 1,100,000.

New York Power, which renders gas and electric service in the northeastern part of New York State, was organized in 1927 as a result of the consolidation of five direct subsidiaries of Mohawk Hudson Power Corporation. Central New York, which renders gas and electric service in the central and northern part of New York State, was organized in 1937 as a result of the consolidation of twelve direct subsidiaries of Niagara Hudson.

Buffalo Niagara renders electric service in the western part of New York State, including the cities of Buffalo and Niagara Falls. It was organized in 1937 as a result of the consolidation of three constituent companies. In 1945 Buffalo Niagara and Eastern Power Corporation, an intermediate holding company subsidiary of Niagara Hudson, and three other companies were consolidated into Buffalo Niagara. Niagara Falls, all of whose stock is owned by Buffalo Niagara, and Canadian Niagara Power Company, Limited, all of whose stock is owned by Niagara Falls, generate hydro-electric energy, substantial amounts of which are sold to Buffalo Niagara.

Niagara Hudson has been registered as a holding company under the Act since June 1948. Prior to that time it was subject to the Act as a subsidiary of United.[1]

[1] United registered as a holding company in 1938. In 1943 we issued an order under Section 11 (b) (2) of the Act directing it to change its capitalization to one class of common stock and to take such other action as to cause it to cease being a holding company (13 S.E.C. 854). In August 1948, we approved a plan filed by United for the complete retirement of its preference stock (—— S.E.C. ——, Holding Company Act Release No. 8396), which was approved by the U. S. District Court, District of Delaware, on January 31, 1949. Appeals from the order of the District Court are pending in the Court of Appeals for the Third Circuit. United consummated the plan as of April 30, 1949. Subsequently United filed a plan proposing to distribute to holders of its common stock approximately 50% of its holdings of shares of Niagara Hudson common stock. Hearings have been held on this plan of United.

Appendix A contains condensed balance sheets per books as of December 31, 1948, of Niagara Hudson on a corporate basis and as consolidated with its subsidiaries. As therein indicated gross consolidated assets totalled $624,983,698, of which $556,500,803 represented gross consolidated utility plant. The consolidated reserve for depreciation totalled $171,212,674, or 30.8% of gross consolidated utility plant. The utility plant of the subsidiary companies subject to the jurisdiction of the Public Service Commission of New York[2] is stated at original cost as found by that Commission.[3] In 1948, pursuant to orders of the Public Service Commission of New York, the reserves for depreciation of these companies were increased by transfers from surplus aggregating $43,000,000, so that accrued depreciation, determined on a straight-line basis, is stated at amounts found to be adequate by that Commission. Current depreciation accruals are being determined in the manner prescribed by the Public Service Commission of New York.

Appendix B shows corporate statements of income of Niagara Hudson for the years 1946-1948, inclusive, and Appendix C shows condensed consolidated statements of income for Niagara Hudson and its subsidiaries for the years 1937-1948, inclusive. As indicated in Appendix C, consolidated operating revenues for 1948 amounted to $138,161,000. As shown by Appendix B, almost all of Niagara Hudson's income is derived from dividends on the common stocks of its subsidiaries.

The securities of Niagara Hudson outstanding as of December 31, 1948, and the distribution of ownership as between United and other holders, were as follows:

TABLE II

Securities	Principal Amount or Number of Shares		
	Total Outstanding	Owned by United	Owned by Others
Notes payable to banks.....	$20,000,000[a]	—	$20,000,000[a]
First Preferred Stock 5% Series $100 par value	378,875 shs.	—	378,875 shs.
Second Preferred Stock 5% Series A and B $100 par value	105,930 shs.	48,529 shs.(46%)	57,401 shs.(54%)
Common Stock, $1 par value...	9,580,988½ shs.	2,818,397 shs.(29%)	6,762,591½ shs.(71%)

[a] Payments on these notes in the first half of 1949 have reduced the amount outstanding as of July 1, 1949, to $16,000,000.

In addition, Niagara Hudson has outstanding Class B Stock Option Warrants entitling the holders thereof to purchase at any time 497,191⅔ shares of common stock, each warrant entitling the holder to 1⅙ shares of common stock upon payment of $50.

The First and Second Preferred Stocks, in their respective orden of priority, have a preferential right to cumulative dividends at the rate of 5% per annum and to $100 per share plus accrued dividends upon voluntary or involuntary liquidation and are redeemable at $107.50 per share plus accrued dividends. The preferred stocks as well as the common stocks have one vote per share. Of the total voting power, 95.2% is thus vested in the common stock. The securities of Niagara Hudson owned by United represent 28.5% of the voting power.

[2] Out of the total of $556,500,803, only $24,775,934 represented utility plant of companies not subject to the jurisdiction of the New York Commission.

[3] Original cost is defined by the New York Commission to mean the cost of utility plant to the person first devoting it to public use.

Dividends were paid regularly on Niagara Hudson's preferred stocks from issuance of the stocks in 1937 to September 1942. They were suspended on the latter date following an order by the Federal Power Commission directing a substantial write-off in the fixed capital account of Niagara Falls which, if reflected in the system accounts, would have created surplus deficits. At about the same time original cost and depreciation studies were being made by the New York Public Service Commission in respect of Niagara Hudson's utility subsidiaries operating in the State of New York which also raised questions as to possible required write-offs. However, system earnings throughout the period in which arrears existed on the preferred stocks of Niagara Hudson were sufficient to cover the preferred dividend requirements. After the surplus problems of the subsidiaries were solved by reductions in their respective capital or capital contributions,[4] and Niagara Hudson reduced the par value of its common stock from $10 to $1 per share in December 1945,[5] to create sufficient surplus to absorb downward adjustments in its investment account, dividends on the First Preferred Stock were resumed on February 1, 1946, and dividends on the Second Preferred Stock on February 1, 1948. The last of arrearages on the First Preferred Stock and Second Preferred Stock were paid on February 1, 1948, and May 1, 1948, respectively, and dividends on these stocks are being paid currently.

Niagara Hudson's three major direct subsidiaries have outstanding debt securities and preferred stocks owned outside the system, and Niagara Falls also has publicly held debt securities outstanding. Table III below shows, as of December 31, 1948, the consolidated capitalization and surplus of the system.

TABLE III

	Niagara Hudson and Subsidiaries Consolidated	
	Amount	%
Subsidiaries of Niagara Hudson:		
Funded Debt[a]	$174,729,969	41.4
Notes Payable to Banks[b]	31,500,000	7.5
Preferred Stocks	79,000,000	18.7
Premium on Preferred Stocks	1,081,000	.3
	$286,310,969	67.9
Niagara Hudson:		
Notes Payable to Banks[c]	$ 20,000,000	4.8
First Preferred Stock	37,887,500	9.0
Second Preferred Stock	10,593,000	2.5
	$ 68,480,500	16.3
Common Stock	$ 9,580,989	2.3
Capital Surplus	21,249,841	5.0
Earned Surplus	35,802,786	8.5
	$ 66,633,616	15.8
Total Capitalization and Surplus	$421,425,085	100.0

[a] Includes liability relating to reservoirs amounting to $3,023,969.

[b] Includes $1,500,000 due within one year.

[c] Includes $3,000,000 due within one year. Subsequent to December 31, 1948, payments in the amount of $4,000,000 were made so that as of July 1, 1949, the amount outstanding was $16,000,000. The president of Niagara Hudson testified that he expected the unpaid balance of these notes to be $12,000,000 by January 1, 1950.

[4] Holding Company Act Releases Nos. 4911 (1944); 5583, 5679, 5763, 6083, 6108 (1945).

[5] Holding Company Act Release No. 6206.

III. PRIOR PROCEEDINGS

In 1942 we instituted proceedings under Section 11(b)(2) of the Act in respect of the Niagara Hudson system,[6] at which time it included 26 corporate entities. Among the most important problems under Section 11(b)(2) were those relating to the system's western companies, which were subsidiaries of Buffalo, Niagara and Eastern Power Corporation ("BNE"), a holding company subsidiary of Niagara Hudson. In June 1944, we issued our Findings and Opinion and Order, which among other things directed BNE to recapitalize.[7] Thereafter, Niagara Hudson, BNE, and other system companies filed a number of plans and refinancing proposals, the total effect of which has been to eliminate fourteen corporate entities from the system and to simplify the security structures of the remaining subsidiaries. An important change in this connection was the consolidation in 1945 of the system's western properties into a new consolidated operating company, the present Buffalo Niagara.[8]

The plan for the 1945 consolidation provided, among other things, for the retirement of BNE's second preferred stock by means of a cash contribution by Niagara Hudson of $63,000,000, to be obtained from treasury cash, a bank loan of $40,000,000 and the proceeds of the sale of portfolio securities, and for the acquisition by Niagara Hudson of all of the common stock of Buffalo Niagara. However, because of the new system complexity resulting from the creation of the $40,000,000 bank loan by Niagara Hudson, and since the retention by Niagara Hudson of the interest to be acquired in Buffalo Niagara would leave unresolved other questions pertaining to the structure of the Niagara Hudson system, we conditioned our approval of the plans upon an appropriate modification to provide for the disposition by Niagara Hudson of its interest in Buffalo Niagara within one year from the effective date of the consolidation.

An amendment including such a provision was filed, and at intervals since 1946 we have at Niagara Hudson's request extended the time for complying with these requirements, the last extension being until November 1, 1949.[9] In support of its requests for extensions, Niagara Hudson urged that further system simplification and the required disposition of Buffalo Niagara common stock could be most advantageously achieved by first consolidating its three major subsidiaries, and then disposing of the common stock of the consolidated company, using some of it to retire the bank notes and the Niagara Hudson preferred stocks, thus putting Niagara Hudson in a position to dissolve.

IV. THE PLANS

A. The Consolidation Plan

The major provisions of the Consolidation Plan are:

(1) Buffalo Niagara, Central New York, and New York Power will be consolidated into a single electric and gas utility company, the New Operating Company, which will assume the debts and other liabilities of the three consolidating companies.

(2) The shares of common stocks of the consolidating companies (all held by Niagara Hudson) will be exchanged for shares of common stock of the New Operating Company, and the shares of preferred stocks of the consolidating companies (all publicly held) will be exchanged on a share for share basis for shares of preferred stock of the New Operating Company bearing the same dividend rates. Table IV shows in summary form the stocks of the consolidating companies and the corresponding stocks of the New Operating Company to be issued in exchange therefor:

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[6] *Niagara Hudson Power Corporation*, Holding Company Act Release No. 3754.

[7] *Niagara Hudson Power Corporation*, —— S.E.C. ——, Holding Company Act Release No. 5155.

[8] See *Niagara Hudson Power Corporation*, —— S.E.C. —— (1945), Holding Company Act Releases Nos. 6083 and 6108, aff'd *Phillips* v. *S.E.C.*, 156 F. 2d 606 (C.A. 2, 1946).

[9] See *Buffalo, Niagara and Eastern Power Corporation*, —— S.E.C. —— (1946), Holding Company Act Release No. 6963, and Holding Company Act Releases Nos. 7365 (1947), 7800 (1947), 8220 (1948), 8623 (1948), and 9075 (1949).

TABLE IV

Consolidating Companies' Stocks	Number of Shares	New Operating Company Stock			
		Preferred Stock ($100 par value)			Common Stock without par value
		3.40% Series	3.60% Series	3.90% Series	
Central New York Preferred Stock 3.40% Series ($100 par value)	200,000	200,000			
Buffalo Niagara Preferred Stock 3.60% Series ($100 par value)	350,000		350,000		
New York Power Preferred Stock 3.90% Series ($100 par value)	240,000			240,000	
Central New York Common Stock without par value	1,581,358				
Buffalo Niagara Common Stock without par value	3,000,000				9,580,989
New York Power Common Stock without par value	1,300,000				

(3) Each holder of shares of preferred stocks of the consolidating companies shall further be entitled to receive cash in an amount equal to unpaid dividends accrued on his shares to the effective date of the consolidation.

The proposed consolidation is subject to the approval of and has been approved by the Public Service Commission of the State of New York, the only state commission having jurisdiction.

B. The Dissolution Plan

The Dissolution Plan is expressly conditioned upon prior consummation of the Consolidation Plan. Its major provisions in substance are:

(1) Prior to the effective date of the Dissolution Plan Niagara Hudson will transfer to the New Operating Company all of its investments except the common stock of the New Operating Company.

(2) The common stock of the New Operating Company will be reclassified into 1,939,220 shares of Class A stock and 7,473,172 shares of common stock, both without par value. Subject to the prior rights of the New Operating Company preferred stock, the shares of Class A stock will have preference as to and be limited to cumulative dividends of $1.20 per share per annum. Each share of Class A stock will be convertible at the option of the holder into 1.1 shares of the common stock of the New Operating Company during the first three years after the effective date of the Dissolution Plan, and into one share during the succeeding three years, after which the conversion privilege will terminate. After the end of the initial three year period, the Class A stock will be redeemable at the option of the New Operating Company in whole or in part at $26.875 per share plus accrued dividends to the redemption date.

Holders of Class A stock will have the same voting rights as holders of common stock. They will have no preemptive rights but will be entitled to prior notice of any preemptive rights inuring to the common stock and thus be given an opportunity to convert their shares of Class A stock into common stock before the exercise of such rights. The Class A stock will have no preference as to assets in case of liquidation or dissolution, but the New Operating Company will not be able voluntarily to liquidate or dissolve without the consent of holders of two-thirds of the outstanding Class A stock.

(3) Holders of the outstanding preferred stocks of Niagara Hudson will receive in exchange for each share of Niagara Hudson preferred stock four shares of Class A stock of the New Operating Company, without distinction between the first and second preferred stocks of Niagara Hudson. Any shares of Class A stock not claimed by such preference stockholders at the end of ten years from the effective date of the Dissolution Plan will be surrendered to the New Operating Company.

(4) For a period of six months after the effective date, common stockholders of Niagara Hudson will have the right to obtain common stock of the New Operating Company on the basis of .78 share of New Operating Company common stock for one share of Niagara Hudson common stock plus a ratable amount of cash per share of Niagara Hudson common stock necessary to pay off the bank loan of Niagara Hudson outstanding at the effective date. Cash so received will be applied to the payment of the bank loan. Niagara Hudson has estimated that as of July 1, 1949, such cash amount would be approximately $1.60 per share of Niagara Hudson common stock.

(5) Subject to our approval, Niagara Hudson, within two years after the effective date, will dispose of the common stock of the New Operating Company not distributed pursuant to the exchange offer unless such period is extended by this Commission. Until full payment of the bank loan no dividends will be declared or paid upon the common stock of Niagara Hudson. Upon payment of the bank loan the remaining New Operating Company common stock held by Niagara Hudson will be distributed pro rata to its remaining stockholders, and thereafter Niagara Hudson will dissolve.

(6) Holders of Niagara Hudson common stock or of Class A stock of the New Operating Company who are entitled to receive fractions of a share of common stock of the New Operating Company will receive in lieu thereof transferable scrip, exchangeable on or before June 30, 1955, for full shares of common stock of the New Operating Company when presented in amounts aggregating one or more full shares. Thereafter any shares represented by outstanding scrip certificates will be sold and the proceeds thereof will be held for the account of the holders of the scrip certificates for a further period of two years, after which all unsurrendered scrip certificates will become void.

(7) No provision is made for the outstanding Class B stock option warrants of Niagara Hudson, which are deemed to be without present or reasonably potential value, and all rights of such warrant holders will terminate as of the effective date.

(8) At an appropriate time after the effective date, application will be made to list the Class A and common stocks of the New Operating Company on the New York Stock Exchange.

The Public Service Commission of New York has indicated by memorandum that in the event we approve the Dissolution Plan that Commission will approve the reclassification of the common stock of the New Operating Company into Class A and common stock.

C. Provisions Common to Both Plans

Both plans contain the following general provisions:

(1) This Commission shall find that the transactions under the plans are necessary or appropriate to the simplification of the holding company system and to effectuate the provisions of Section 11 (b) of the Act, in accordance with the requirements of the Internal Revenue Code.

(2) The plans shall not become effective until the Commission shall have instituted proceedings in a court of competent jurisdiction pursuant to Section 11 (e) of the Act and such court shall have entered an order approving and enforcing the plans.

(3) Niagara Hudson will pay such fees and expenses in connection with the plans as we shall finally determine or allow.

D. Description of System Upon Consummation of the Plans

The New Operating Company will bring together under one corporate entity substantially all the gas and electricity operations of the Niagara Hudson system in the State of New York. Appendix D shows balance sheets as of December 31, 1948, and Appendix E sets forth income statements for the year 1948, of Central New York, Buffalo Niagara and its subsidiaries consolidated, and New York Power, as well as pro forma consolidated statements giving effect to the consolidation of those three companies into the New Operating Company. The following table summarizes the pro forma capitalization and surplus of the New Operating Company and subsidiaries as of December 31, 1948.[10]

TABLE V

The New Operating Company and Subsidiaries

	Amount	Per Cent
Long-Term Debt		
Funded Debt	$171,706,000	42.3
Notes payable to banks[a]	31,500,000	7.7
Long-term liability relating to reservoirs	2,427,307	.6
Total long-term debt	$205,633,307	50.6
Preferred Stock		
Preferred Stocks plus premiums	$ 80,081,000	19.8
Total long-term debt and preferred stocks	$285,714,307	70.4
Class A Stock, Common Stock and Surplus		
Class A and Common stocks	$ 95,809,890	23.6
Surplus	24,535,881	6.0
Total Class A stock, Common stock and surplus	$120,345,771	29.6
Total capitalization and surplus	$406,060,078	100.0

[a] Includes $1,500,000 due within one year.

This table is derived from statements submitted by Niagara Hudson which make no allocation of capital between the Class A and common stock of the New Operating Company, but show the capital attributable to the two classes of stock as one figure. In our opinion, this would not be consistent with good accounting practice which would require that the accounts and statements of the New Operating Company show separately the capital represented by each class of stock. In the case of stocks without par or stated value such as the Class A and common stocks here, this would require an allocation on an appropriate basis to show the consideration received on issuance for each class of stock. Published statements showing the capital allocated to each class of stock should, of course, also have adequate explanatory material or notes regarding the characteristics of the Class A and common stocks.

V. APPLICABLE STATUTORY STANDARDS

In order to approve the plans of Niagara Hudson under Section 11 (e) of the Act we must find them necessary to effectuate the provisions of Section 11 (b) and fair and equitable to the persons affected thereby.

A. Necessity of the Plans

To find the plans necessary to effectuate the provisions of Section 11 (b) we must find that there is a need for action to achieve compliance with that section and that the action proposed is an appro-

[10] Appendices D and E and Table V do not give effect to the transfer to the New Operating Company of miscellaneous assets of Niagara Hudson or of the properties of Old Forge Electric Corporation and of Union Bag & Paper Power Corporation, which it is anticipated will be merged into Central New York and New York Power, respectively, prior to the effective date of the consolidation. These additions would have only a minor effect on the figures shown.

priate means of achieving such compliance. If a plan provides an appropriate means for achieving results required by Section 11 (b), it is necessary under Section 11 (e), even though it is not the only plan that might fulfill the statutory requirements, and even though complete compliance is not achieved immediately, so long as it offers reasonable promise of substantial progress in complying with Section 11 (b).[11]

Under Section 11 (b)(2) of the Act, it is our duty to require that such steps be taken as we find necessary to eliminate any undue or unnecessary complexity in the structure of the Niagara Hudson system or to ensure that voting power is not unfairly and inequitably distributed among the security holders of that system, and to require that Niagara Hudson cease to be a holding company with respect to a subsidiary which itself has a subsidiary company which is a holding company (the great-grandfather clause). As noted earlier, we instituted Section 11 (b)(2) proceedings with respect to the Niagara Hudson system in 1942, and in 1944 ordered the reorganization of BNE as a step in compliance with that section. In passing on the plans submitted by Niagara Hudson and BNE in response to that order, which resulted in the consolidation of BNE into Buffalo Niagara, we recognized that the creation of the Niagara Hudson bank loan injected a complexity in the system structure, and that there were other unresolved problems under Section 11 (b)(2), including the existence of more than three tiers of holding companies in contravention of the second sentence of Section 11 (b)(2). It was because of these factors that we required, as a condition to our approval of those plans, that Niagara Hudson undertake to dispose of its interests in Buffalo Niagara, which action would have brought the system into compliance with the great-grandfather clause of Section 11 (b)(2), would have enabled Niagara Hudson to eliminate the bank loan, and would have put it in a position to proceed with its announced intention to eliminate its preferred stock or effectuate its ultimate liquidation or dissolution.

Since 1945 there has been substantial progress in the simplification of the Niagara Hudson system below the level of Niagara Hudson itself. The remaining problems under Section 11 (b)(2) arise from the existence of the Niagara Hudson bank debt and preferred stock, and the presence of Buffalo Niagara as a subsiidary holding company with a subsidiary which is also a holding company. The Niagara Hudson bank debt and preferred stock constitute an undue complexity in the structure of the system. We have in numerous cases found that such senior securities of a holding company constitute an undue complexity where they are based principally on operating company common stocks which are in turn junior to substantial amounts of publicly held senior securities, the situation present in the Niagara Hudson system.[12]

The results required by Section 11 (b)(2) here are the simplification of the system structure by the elimination of Niagara Hudson's bank loans and preferred stock, and the termination of Niagara Hudson's status as a holding company with respect to Buffalo Niagara. In addition, the security structure of Niagara Hudson presents some question as to inequitable distribution of voting power in the system, for the Niagara Hudson common stock, with an equity of approximately 16% of the consolidated capitalization and surplus as of December 1, 1948, has approximately 95% of the voting power of the Niagara Hudson securities.

Niagara Hudson has chosen to comply with our order and the other requirements of Section 11 (b)(2) by the program embodied in the two plans presently before us. This program envisages three major steps, the consolidation of the three principal operating subsidiaries, the exchange of Class A stock of the New Operating Company for the Niagara Hudson preferred stock, and the exchange of New Operating Company comon stock for common stock of Niagara Hudson and the ultimate elimination of Niagara Hudson as a holding company by its dissolution.

Consummation of the plans will achieve the specific results which we have found are required by Section 11 (b)(2). The ultimate dissolution and liquidation of Niagara Hudson will comply with our order for the divestment of its interests in Buffalo Niagara and bring the system into compliance

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[11] *The United Corporation*, —— S.E.C. —— (1948), Holding Company Act Release No. 8396, approved and ordered enforced in *In re The United Corporation*, —— F. Supp. —— (D.C. Del., January 31, 1949, Civil Action No. 1146), and cases cited therein.

[12] See *Public Service Corporation of New Jersey*, —— S.E.C. —— (1948), Holding Company Act Release No. 8002; *The Commonwealth & Southern Corporation*, 11 S.E.C. 138 (1942), aff'd 134 F. 2d 747 (C.A. 3, 1943).

with the great-grandfather clause of Section 11 (b)(2). The Niagara Hudson preferred stock, as such, will be retired in exchange for Class A stock of the New Operating Company. Provision is made for the total or partial elimination of the bank loan through voluntary contributions by Niagara Hudson common stockholders in exchange for common stock of the New Operating Company, and it is contemplated that in any event the bank loan will be paid in full on or about November 1, 1950, out of retained earnings. Also the voting power in the New Operating Company will be more equitably distributed, since the Class A and common stock, representing 29.6% of the total capitalization and surplus of the New Operating Company, will have 100% of the total voting power.[13] And the holders of the Niagara Hudson preferred stock, now holding 4.8% of the voting power, will receive in exchange therefor Class A stock with cumulative voting rights representing 20.6% of the total voting power, which would increase to 22.2% if all the Class A stock is converted into common stock in the first three year period.

There are other benefits which appear to flow from the consummation of these plans. The consolidation of the principal operating companies will place within a single corporate entity the integrated properties of the system, thereby retaining the benefits of present economies of operation and rate reductions and indicating future benefits in those regards.[14] These properties have been constructed and operated on a state-wide basis since 1930. There is common load supervision and an operating committee which forecasts loads, prepares overall schedules and gives general directions for the dispatch of energy for the most economic overall operation. Construction requirements are formulated on a system rather than an individual company basis.

The elimination of Niagara Hudson as a holding company will also bring the Niagara Hudson system in its entirety within the regulatory powers of the New York State Commission and in addition will make possible wider opportunities for the economical financing of the system by direct operating company issues.[15] Also, the consolidation of the three subsidiaries into the New Operating Company, and the public distribution of the latter's securities should enhance the economic financing of the construction requirements of the system.

The Division has urged that the plans do not meet the necessity standard of Section 11 (e).[16] It argues that the proposed Class A stock will constitute an undue and unnecessary complexity in the corporate structure of the New Operating Company, and also that it is a type of security which does not conform to the standards and policies of the Act, particularly Section 7 thereof, and so is objectionable from the standpoint of public interest and the interest of investors. The use of a convertible security with a position intermediate between the preferred stock and the common stock of the New Operating Company and with a preference over the common stock as to earnings but none as to assets, it urges, is justified only by the existence of unusual and compelling circumstances, which, it asserts, do not exist here because there are feasible alternative methods of retiring the preferred stock. It refers to prior opinions where we expressed the view that generally this type of security contravenes the policies and standards of the Act looking toward the simplification of security structures, and that approval of its use can be granted only where special overriding justification is shown.[16a]

It is clear that the issuance of Class A stock proposed here would not only introduce an additional class of security in the corporate structure of the New Operating Company, but the security is a type

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[13] The preferred stocks of the New Operating Company will not have any voice in the election of directors so long as dividends are paid; upon the accumulation of arrearages equal to four quarterly dividends, holders of the preferred stocks will have the right to elect a majority of the board of directors, which right shall continue until all arrears on the preferred stock have been paid.

[14] In connection with the proceedings before the New York Commission for approval of the consolidation, it was testified that the consolidation would insure present and future economies of operation to such an extent that rates could be reduced by $1,000,000, and such a reduction was put into effect in January 1949.

[15] The New York Commission has general power to regulate rates, service, issuance and sale of securities, sale of property, and accounts. Since the New Operating Company will have a wholly-owned subsidiary, Niagara Falls, it will be a holding company subject to our continuing jurisdiction under the Act unless an exemption under Section 3 is sought and granted.

[16] The Division's opposition to the issuance of Class A stock was taken after consultation with us. In proceedings under the Act the Division is a party representing the public interest, and as such may be required to raise and explore statutory issues which we feel might be neglected if left to private litigants. In view of the statute and prior decisions, the proposal to issue Class A stock posed an issue which we felt should be litigated fully.

[16a] See *The United Gas Improvement Co.*, 12 S.E.C. 1080, 1109 (1943); *Public Service Company of Indiana, Inc.*, —— S.E.C. —— (1947), Holding Company Act Release No. 7554; *Public Service Corporation of New Jersey*, —— S.E.C. —— (1948), Holding Company Act Release No. 8002.

which we could not generally approve under the standards of Section 7 (d) of the Act.[17] Niagara Hudson and others supporting this type of plan assert that the Class A stock in this case will not constitute an undue complexity in the corporate structure of the New Operating Company because the security will be reasonably well protected by the earning power of the system, and its use will avoid difficulty and delay in the achievement of results required by Section 11. The Act does not foreclose this type of security and we must decide, in the exercise of our functions, whether its disadvantages are outweighed by the advantages of its use in this case.

In support of the plans, it has been contended that they present the most satisfactory methods of achieving expeditious compliance with the requirements of Section 11 with the least disturbance and hardship to present security holders of Niagara Hudson. All representatives of Niagara Hudson preferred and common stockholders participating in the proceedings, with one exception, have supported the type of plan proposed by Niagara Hudson,[18] although representatives of the first preferred stockholders have urged that fairness to these stockholders requires certain adjustments in the distribution of securities under the plans. The Public Service Commission of New York also has indicated that it will approve the issuance of Class A stock in the event we approve the plans under Section 11 (e).[19]

The specific function claimed for the Class A stock is to effect the most equitable and expeditious retirement of the Niagara Hudson preferred stocks. The supporters of the plans assert that alternative methods of retiring the stocks, which the Division has pointed to, would be objectionable in this case. Such alternative methods fall within two general categories, a one-stock allocation plan and a cash payment plan.

Under a common stock allocation plan, the preferred stockholders would have to be compensated for the loss of the preferences in earnings presently enjoyed by them. The present and prospective earnings coverages of the present preferred dividends, which we discuss later, are such as to justify a claim that in this case fairness would require an allocation of common stock earnings and dividends in excess of the present preferred dividends. It appears, subject to the relatively minor modification which we indicate later, that the foreseeable earnings and dividends applicable to the New Operating Company common stock into which the Class A stock is convertible under the Dissolution Plan represent the equitable equivalent of the rights surrendered by the Niagara Hudson preferred stockholders. A direct exchange, however, might impose a hardship on such preferred stockholders, in view of the testimony in the record that the initial market price of the package of common stock would not be within a reasonable range of the recent market price of the preferred stock. Preferred stockholders who were unable or unwilling to hold the common stock until it more nearly reflected its inherent value, would be faced with an immediate and relatively substantial loss in market value. On the other hand, it appears that the package of Class A stock, which preserves a priority in dividends and affords an opportunity to participate in increased earnings at the common stock level, will have an initial market price within a close range of the market price of the preferred stock. The use of the Class A stock thus presents an opportunity to avoid the hardship which preferred stockholders might suffer under an allocation plan without requiring an excessive give-up by the common stockholders.[20]

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[17] Although not absolute limitations upon our power to approve plans under Section 11, the provisions of Section 7 set the standards for new security issues proposed by such plans; they are admonitory, not peremptory. *Public Service Commission of New York* v. *S.E.C.*, 166 F. 2d 784 (C.A. 2, 1948), affirming *In re Kings County Lighting Co.*, 72 F. Supp. 767 (D.C., E.D.N.Y. 1947), certiorari denied, 334 U.S. 838. See also *The Commonwealth & Southern Corporation*, 11 S.E.C. 138, 158 (1942), aff'd *The Commonwealth & Southern Corp.* v. *S.E.C.*, 134 F. 2d 747 (C.A. 3, 1943).

[18] Judah Adelson, appearing in his own behalf as a small Niagara Hudson common stockholder, objected generally to the plans, claiming that Niagara Hudson had misled and misinformed small common stockholders and that such stockholders were not being dealt with fairly.

[19] The New York Commission has found that under the circumstances of this case, the issuance of Class A stock, if approved by us, will produce a result which is in the public interest. In making this finding, the Public Service Commission recognized that, while both it and we have a duty to protect the investing public, our respective approaches to the problem may be different because of the differences in our duties.

[20] The existence of such a hardship to the preferred stockholders would not by itself necessarily affect the fairness of the plan, because such a plan is properly tested not by the market prices prevailing at any given time, but on the basis of appropriate long term values. The avoidance of this hardship through the issuance of Class A stock, however, is a factor which properly may be considered in passing on the appropriateness of the proposal to issue such stock. *Cf. The United Gas Improvement Co.*, 12 S.E.C. 1080 (1943), and *Public Service Corporation of New Jersey*, —— S.E.C. —— (1948), Holding Company Act Release No. 8002.

Supporters of the company's plans have also pointed to a number of difficulties which might exist in connection with a plan to retire the Niagara Hudson bank debt and preferred stock through cash payments. These difficulties would not by themselves necessarily be recognized as reasons for foregoing necessary plans to achieve compliance with the requirements of Section 11 (b), and we have in the past approved cash payment plans notwithstanding objections based on similar contentions. Nevertheless, it does not follow that the method proposed by the company in this case should be found fatally defective because it offers a means of avoiding these problems.

Under the circumstances we believe that the Class A stock plan preserves the greatest value to all the security holders affected. The Class A stock method, which, as we have noted, has the active support of representatives of all classes of Niagara Hudson securities, appears to offer promise of expeditious consummation in a manner which, as we have found, is within the scope of the Act.

The Class A preferred dividends, as we indicate later, will be adequately covered by the reasonably foreseeable earnings of the New Operating Company. Utility plant of the new company will be stated at original cost as directed and approved by the Public Service Commission of New York, and depreciation reserves have been adjusted upwards by some $43,000,000 within the past year, so that such reserves are equivalent to approximately 31% of utility plant. In addition, depreciation reserves are being accrued on a basis found adequate and approved by the New York Commission. Thus there is no prospect of any further adjustments or write-offs in plant accounts or the necessity of further increases in depreciation reserves. Further, the interest cost of long term money of the New Operating Company is only 2.86%, and the annual cost of the preferred stock is 3.64%, both of which are quite favorable rates. And the position of the Class A stock would, under the conditions we have previously outlined, be fully disclosed on the balance sheet. All of these facts minimize the possible harmful effects of the injection of the Class A stock in the security structure of the New Operating Company.

The Division has argued that the existence of Class A stock will impede the future ability of the New Operating Company to raise funds through the issuance of additional common stock. In considering this possibility the situation of the New Operating Company under the plans must be contrasted with the situation which would exist if an all common stock plan were adopted under which there would be immediately issued the larger number of shares of common stock which under the present proposal would be outstanding upon full conversion of the Class A stock. Viewed in this light, under the circumstances of this case we are of the opinion that the issuance of the Class A stock would not have a significant adverse effect on the New Operating Company's ability to finance its growth by raising additional equity money when needed.

We realize that the issuance of the Class A stock will give the New Operating Company an equity attributable to the common stock which as a percentage of total capitalization and surplus is lower than what we would normally approve from the viewpoint of a sound capital structure.[21] In permitting the issuance of this stock we have relied not only on the above factors, but also on the transitional nature of the Class A stock. As indicated in our later discussion it appears that conversion of Class A stock into common stock would result in a substantial enhancement in dividend income and, assuming that market conditions are not adverse, there is good likelihood of substantial conversions under the incentive of the declining conversion rate and the possibility of call, with complete elimination of the Class A stock being a possibility.

In this connection, Niagara Hudson has stated that, if we deem it advisable, the company will have no objection to a modification to permit redemption of the Class A stock even during the first three year period. We believe it would be desirable to have the redemption privilege available at all times, and thus increase the possibility of eliminating the Class A stock from the capital structure of the new company. Niagara Hudson's preferred stock is presently subject to redemption at any time,

[21] As previously indicated, Niagara Hudson has shown the Class A and common stock capital as one lump sum, and has argued that the Class A stock is not a preferred stock in every respect but is primarily an equity stock with a dividend preference. Nevertheless, we deem it clear that the common stock equity is reduced as a result of the issuance of the Class A stock and that, as earlier noted, the capital attributable to each class of stock should be separately stated.

and we find that it would be appropriate to amend the Dissolution Plan so as to provide that the proposed Class A stock shall be callable at any time.[22]

Although it is admitted that the Class A stock, as the Division points out, will not have all the protective features which we have normally required for preferred stocks, it is argued that the protective features applicable to the Class A stock are adequate under the circumstances. The Class A stock, as pointed out earlier, has no preference as to assets on liquidation, although it will be protected against voluntary liquidation without the consent of the holders of two-thirds of the total number of shares of Class A stock outstanding. The Division, as well as other participants, has criticized this provision, however, on the ground that it does not cover the situation of a sale of all or substantially all the property of the company. We believe this is a valid criticism and that the reclassification certificate should be amended so as to make the consent of holders of two-thirds of the Class A stock a prerequisite also to any sale or transfer of all or substantially all of the property of the new company. Further, the Committee, among others, has pointed out that the provisions intended to protect the Class A stock against dilution do not protect it against the sale of common stock at prices substantially below prevailing market prices, against which the common stockholders would be protected by their preemptive rights whereas the Class A stockholders would have no similar protection. We find that it would be appropriate that the anti-dilution provision also be modified so as to provide that, so long as the conversion privilege is outstanding, additional shares of common stock shall not be issued upon the exercise of preemptive rights at a price more than 10% below the market price at the time of an offering.

We affirm our prior decisions that in the absence of strong countervailing factors, the standards of Section 7 (d) of the Act would militate against the issuance of a dividend preference convertible stock.[23] Section 7 manifests a clear intention to limit the securities issued by companies subject to the Act to a circumscribed number of simple types. But the section indicates just as clearly that reorganization may present problems calling for greater flexibility of action. We conclude that the plans, with the modifications described above, which Niagara Hudson has agreed to make, constitute an appropriate method of achieving compliance with the Act. In reaching this conclusion, in the exercise of our considered discretion, we have relied not only on all of the factors mentioned above, without all of which we could not have found that the plans would meet the requirements of the Act, but also on the fact that these plans have been worked out as the final steps in a program which over a period of years has achieved substantial progress in the simplification of the system structure.

We conclude that, if the plans are modified in the specified respects, the use of the proposed Class A stock is permissible under the circumstances of this case and that such securities may be issued by the New Operating Company. Assuming that such modifications are made, we find that the plans are an appropriate means of effectuating the provisions of Section 11 (b) and therefore meet the necessity standard of Section 11 (e). In view of all of the foregoing, we make no adverse findings under the Act in respect of the issuances, exchanges and acquisitions incident to the proposed transactions for which approval has been requested.

B. Fairness of the Plans

To approve these plans under Section 11 (e) we must also find them fair and equitable to the persons affected, who in this case are the holders of the preferred stocks of Buffalo Niagara, Central New York and New York Power, and the holders of Niagara Hudson's preferred stocks, common stock, and option warrants to purchase common stock.

In a Section 11 (e) reorganization "fair and equitable" treatment means that each security holder, in the order of his priority, must be accorded the equitable equivalent of the rights surrendered. In

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[22] It has been suggested that, in addition to making the Class A stock callable at any time, the conversion rate of 1.1 shares of common stock for 1 share of Class A stock be maintained for the full six year period, instead of declining to 1 for 1 during the second three years. We are not convinced that this change is necessary to assure a reasonable probability of conversions or is otherwise appropriate.

[23] See cases cited *supra*, note 16.

simplification proceedings pursuant to Sections 11 (b)(2) and 11 (e), of the Act, the charter liquidation or redemption preferences are not matured and therefore do not of themselves determine what rights are being surrendered, but instead security holders are to be given the equitable equivalent of the securities' investment value on a going concern basis.[24] This means that the rights being surrendered are to be appraised with primary emphasis on currently effective rights such as rights in respect to earnings and dividends, rather than inchoate rights which arise only in the event of liquidation or redemption.[25] Thus, to arrive at a determination whether the proposed plan satisfies the standard of fairness, we must compare the existing position of the various security holders with what they are to receive under the plans.

In the following presentation we shall consider the data concerning the position and prospects of the various security holders before and after consummation of the plans and the questions regarding fairness with respect to each class of security holders.

1. *Earnings*

The following table summarizes certain pertinent data with respect to the earnings history of Niagara Hudson and its subsidiaries on a consolidated basis for the years 1937-1948, inclusive, based on the consolidated statements of income appearing in Appendix C.

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[24] *S.E.C.* v. *Central-Illinois Corp.*, —— U.S. —— (1949), citing *Otis & Co.* v. *S.E.C.*, 323 U.S. 624 (1945).

[25] While this case differs from the *Otis* case, in that the Niagara Hudson preferred stocks were issued in 1937, after the passage of the Act, absent any other distinguishing factors we believe that the principles laid down in that case and affirmed in *S.E.C.* v. *Central-Illinois Corp.* are equally applicable here.

TABLE VI

(000 omitted from dollar amounts)

Year	Operating Revenues	Gross Income, Net of Special Charges in Lieu of Taxes (a)	Income Deductions, Including Subsidiary Preferred Dividend Requirements	Net Income	Balance for Common Stock (b)	Times Earned, after Adjustment of Charges in Lieu of Taxes: Income Deductions	Income Deductions and Niagara Hudson First Preferred Dividend Requirements	Income Deductions and Niagara Hudson First & Second Preferred Dividend Requirements
1937.....	$ 87,562	$28,722	$18,572	$10,150	$ 7,928	1.55	1.41	1.38
1938.....	82,371	24,814	17,619	7,195	4,771	1.41	1.27	1.24
1939.....	85,414	24,783	17,459	7,324	4,900	1.42	1.28	1.25
1940.....	91,492	25,714	16,995	8,719	6,295	1.51	1.36	1.32
1941.....	103,154	26,478	17,366	9,112	6,688	1.52	1.37	1.34
1942.....	110,823	22,849	17,118	5,731	3,307	1.33	1.20	1.17
1943.....	117,735	23,186	17,107	6,079	3,655	1.36	1.22	1.19
1944.....	115,303	23,611	16,755	6,856	4,432	1.41	1.27	1.23
1945.....	115,305	22,747	14,601	8,146	5,722	1.56	1.39	1.34
1946.....	117,675	25,528	9,456	16,072	13,648	2.70	2.26	2.15
1947.....	129,005	23,775	8,915	14,860	12,436	2.67	2.20	2.10
1948.....	138,161	21,807	8,348	13,459	11,035	2.61	2.13	2.02

(a) Charges in lieu of Federal income taxes of $3,307,000, $5,726,000, $1,053,650 and $129,000 in the years 1944-1947, inclusive, have been deducted in arriving at gross income.

(b) After dividend requirements on Niagara Hudson preferred stocks, amounting to $2,222,023 in 1937 and $2,424,025 thereafter. The annual dividend requirement on the first preferred stock amounts to $1,894,375 and on the second preferred stock to $529,650.

The above summary shows that after a drop between 1937 and 1938, there has been a relatively continuous growth in operating revenues from 1938 through 1948, operating revenues for 1948 being about 68% greater than in 1938. Gross income, however, although showing a trend not too different from that of operating revenues in the period 1937 through 1941, suffered a sharp decline between 1942 and 1945, due primarily to the impact of much heavier income taxes during the war years. In 1946 there was a substantial increase in gross income over 1945, reflecting in large part the reduction in tax burdens at the end of the war. In 1947 and 1948, however, the trend was down again, accounted for this time principally by (1) the post-war increases in fuel and material prices and in wages; (2) increased demands and also, in 1948, drought conditions, both of which required reliance on less efficient stand-by power stations and larger amounts of power purchased at high prices; and (3) rate reductions in the latter part of 1947.

The three years since 1945 show a very great improvement in net income, which is attributable to the savings in subsidiary interest and preferred dividend requirements, resulting from refinancings and reductions in amount of outstanding subsidiary debt and preferred stock, made possible in part by capital contributions by Niagara Hudson. Prior to this period, the earnings coverages for income deductions and dividend requirements on Niagara Hudson's first and second preferred stocks were not very great, the overall coverage having been no better than 1.38 times and as low as 1.17 times. In the years 1946 through 1948, however, covering the period after elimination of excess profits taxes and after completion of the refinancings, the earnings coverages have been much improved, the overall requirements for income deductions and preferred dividends having been earned not less than 2.02 times in this period.

The marked increase in net income for the years 1946 through 1948 reflects changes over the prior period, including the reduction in tax levels and prior charges and the steady growth in revenues, which are of such a nature that it would appear that the earnings history in those three years is more significant as an indication of the future earning power of the system than the earnings reported prior to 1946. However, in looking at the Niagara Hudson consolidated earnings for those years as a guide to what might be expected of the New Operating Company in the future, we note two factors which at least partially offset each other, namely, that such earnings reflect corporate expenses and income taxes of Niagara Hudson which would not be applicable to the same extent to the New Operating Company, and also that the Niagara Hudson system has had the benefit of savings resulting from the use of a system consolidated federal income tax return, which also would not be applicable to the New Operating Company.[26] The reduction of interest payments on Niagara Hudson's bank loan, which it is anticipated will be completely paid by the end of 1950, tends progressively to minimize the importance of continuing the consolidated tax return. The decreasing importance of the tax reduction resulting from consolidation of returns, coupled with the fact that a large part of the corporate expenses and taxes of Niagara Hudson will not have to be borne by the New Operating Company, plus the effect of possible economies resulting from the consolidation of the three major subsidiaries, make it likely that the New Operating Company will have a somewhat higher income than Niagara Hudson would have if it were to continue.[27]

There have been submitted in these proceedings forecasts of earnings for the five year period 1948-1952 for the principal subsidiaries of Niagara Hudson, the properties of which under the plans will be vested in the New Operating Company. The forecasts of earnings do not consolidate the

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[26]Consolidated gross income for the period 1946 through 1948 reflected an average of approximately $1,000,000 a year for Niagara Hudson corporate expenses and taxes. It has been estimated that the New Operating Company will have approximately $375,000 of the expenses heretofore borne by Niagara Hudson, which net of tax offset would mean the New Operating Company would have approximately $232,500 of expenses in addition to the expenses presently attributable to the Niagara Hudson subsidiaries being consolidated. The use of a consolidated tax return for the years 1946, 1947 and 1948 is estimated to have reduced system income taxes by approximately $1,208,000, $1,294,000 and $677,000, respectively, of which approximately $1,127,000, $1,155,000 and $631,000, respectively, were estimated to have been savings in income taxes of the principal subsidiaries.

[27]The net income of the Niagara Hudson system as shown in Table VI and Appendix C has reflected interest expense on the Niagara Hudson bank loan, which for the years 1946, 1947 and 1948 amounted to $740,000, $575,000 and $493,000, respectively. The New Operating Company as such will not be subject to this expense, and for this reason, too, its earnings figures for the period during which the bank loan will be outstanding will be higher than system earnings would be if Niagara Hudson were to continue.

earnings from St. Lawrence Power Company, Limited, but reflect the anticipated receipt of dividend income from that source. These forecasts were prepared by Ebasco Services, Incorporated ("Ebasco"), a non-affiliated firm rendering engineering and other services. A summary of the results of such studies setting forth the years 1949-1952, inclusive, and reflecting certain assumptions made with respect to dividend policy during the period and the manner of financing the construction of estimated future property additions, appears below:

TABLE VII

(In Thousands of Dollars)

	1949	1950	1951	1952
Operating revenues				
Electric	$131,363	$136,130	$141,460	$146,171
Gas	17,514	18,710	19,600	20,807
Total operating revenues	$148,877	$154,840	$161,060	$166,978
Operating revenues deductions				
Operation	$ 65,867	$ 66,941	$ 65,367	$ 64,704
Maintenance	12,127	12,250	11,839	11,582
Total operation and maintenance	$ 77,994	$ 79,191	$ 77,206	$ 76,286
Depreciation	12,622	13,353	14,429	15,329
Income taxes	11,029	12,575	14,648	16,246
New York State water charge	1,920	1,940	1,940	1,940
Other taxes	19,226	19,901	20,798	21,893
Total operating revenue deductions	$122,791	$126,960	$129,021	$131,694
Operating income	$ 26,086	$ 27,880	$ 32,039	$ 35,284
Other income	(41)	(41)	(41)	(41)
Gross income	$ 26,045	$ 27,839	$ 31,998	$ 35,243
Income deductions				
Interest on existing long-term debt	$ 5,162	$ 5,125	$ 5,057	$ 4,998
Interest on new bonds and short-term loans	1,054	1,641	2,083	2,532
Other interest charges	27	24	24	24
Interest charged to construction—cr	(666)	(1,551)	(1,218)	(1,245)
Amort. of debt discount and expense	6	6	6	6
Amortization of premium on debt—cr	(80)	(80)	(80)	(80)
Miscellaneous	160	160	160	160
Total income deductions	$ 5,663	$ 5,325	$ 6,032	$ 6,395
Net income	$ 20,382	$ 22,514	$ 25,966	$ 28,848
Preferred dividend requirements	2,876	3,214	3,551	3,551
Balance available for Class A and Common Stocks	$ 17,506	$ 19,300	$ 22,415	$ 25,297

( ) Denotes red figure.

In presenting its estimates, which were prepared in detail separately with respect to electric and gas operations, Ebasco introduced data bearing upon, among other things, trends of kwh sales of electricity and mcf sales of gas to the various classifications of customers, past and estimated future population data, and the trend in type, number and location of dwelling units. Among the basic

premises underlying its forecasts were that (1) the four years 1949 through 1952 will be a period of normal prosperity with relatively high industrial production, employment of the nation's labor force and activity in most classes of the nation's business, (2) the general rise in prices and wages is nearly ended, with price levels stabilizing in 1949 at the level of late 1948 prices, and wage rates by 1951 and 1952 not differing greatly from late 1948 wage rates, (3) currently effective federal income tax rates will continue and (4) there will be no material changes in the electric and gas rates now in effect.

Ebasco estimated that the operating revenues of Niagara Hudson's principal subsidiaries would increase from the reported total of $127,504,000 in 1947 to $166,978,000 in 1952. In order to supply the demand for electricity and gas reflected in this substantial increase in revenues, Ebasco estimated that approximately $207,000,000 would be expended for construction of property additions in 1948-1952. This amount exceeds the approximately $145,745,000 required by the construction program submitted by Niagara Hudson, but the company's program carried only through 1951. A comparison of the Ebasco estimates of construction cost through 1951, for those items included by both Ebasco and the company in their respective construction estimates, shows that Ebasco's estimated cost is $152,644,000 for like items, or a difference from present company estimates of only 4.7%.

After making appropriate allowance for the cash position of Niagara Hudson's principal subsidiaries on a pro forma basis at December 31, 1948, and for cash generated from operations,[28] including $28,528,000 of retained earnings, Ebasco estimated that new securities would have to be issued to raise a portion of the required funds. Ebasco assumed that the required funds from this source could be raised through the issuance of debt securities at an estimated 3.125% interest rate in an aggregate amount of $83,000,000. Ebasco further assumed the issuance of $15,000,000 par value in preferred stock in 1950 at a 4.5% dividend rate, and the sale of $10,000,000 in aggregate amount of common stock in 1952. Ebasco's forecasts also assumed dividend payments at a fixed rate of $1.40 per share applied to 9,606,314 shares reflecting 100% conversion of the Class A stock into common stock for the years 1949-1951, inclusive, and for 1952 at the rate of 75% of estimated available earnings. On this basis, the Ebasco estimate indicates that there will be no material changes in the capital structure of the New Operating Company between 1949 and 1952. At December 31, 1952, long-term debt would aggregate 49.9% of total capitalization and surplus, preferred stock 18.8% and common stock and surplus 31.3%, and the ratio of debt to utility plant less depreciation reserve would be 51.4%.

As we have noted, the Ebasco estimates indicate that the upward trend in system operating revenues will continue through 1952. Ebasco also forecasts, however, a noticeable upswing in gross income commencing in 1949 despite the steadily declining rate of such income for the years 1946-1948, inclusive. Ebasco attributes this to three major basic factors, the cumulative effect of which would be felt commencing in 1949. First, is the continuation of a rapid growth in sales with a potential lowering of unit costs. Second, is the end in 1949 of the increases in price levels and wage rates which were an adverse factor in 1946, 1947 and 1948. Third, is the bringing into operation of new facilities, particularly new generating stations of high efficiency, the first of which were placed in operation in December 1948, reducing the use of expensive reserve generating stations for continuous load and replacing expensive purchased power.

As an important feature of the prospective growth of the Niagara Hudson system, Ebasco also relied on the anticipated greater growth of the residential, commercial and light industrial load, with a lesser rate of growth for the heavy industrial load which has in the past been a predominant factor in the Niagara Hudson system load. And it relied, as well, on a gradual decline in bulk sales at wholesale to other power systems. Since the sales to heavy industrial users and to other utility systems are at low rates, and the sales to the other classes of users are at relatively higher rates, the character of the load growth is estimated to result in an increase in the average price for all energy sold.

After the actual figures for the year 1948 became available, Ebasco prepared and submitted a supplemental report analyzing the differences between actual 1948 results and its estimates. The supple-

[28] The depreciation accruals used by Ebasco apply the rates fixed for such purposes in 1948 determinations made by the New York Public Service Commission.

mental report indicates that the Ebasco estimate for 1948 understated net income by $550,000, or 3.7%. This figure is the composite result, after tax effects, of a number of items, some of which offset others. The items were classified by Ebasco as falling into one of two types, those which in its opinion would have no effect on the estimates for the years 1949-1952, inclusive, and those which in its opinion would have some effect on the estimates for such years. In the first group were two major items which approximately offset each other. In its estimate for 1948, Ebasco showed all customer billings for certain gas service as revenues, whereas on the books a portion of such billings were excluded from revenues and held in a deferred credit account pending final confirmation of a rate in effect since December 1947 under interim approval. To this extent, the Ebasco estimate overstated revenues[29] and net income. Approximately offsetting this, however, was the overstatement of expenses and understatement of net income in the Ebasco 1948 estimate as compared with actual 1948 experience, resulting from the fact that the 1948 drought in the system territory ended earlier than had been expected, thus increasing the available hydro energy and making possible a reduction in the costs of purchased energy and steam generation. As indicated, Ebasco was of the opinion that these two factors, which more or less offset each other, would have no effect on its estimates for later years.

Most of the remaining items of difference between 1948 actual experience and Ebasco's estimate for 1948 reflect an overestimate in operating expenses which resulted in an understatement of net income of $595,000. These differences indicated errors which might reappear to some degree in the estimates for the years after 1948, although an Ebasco witness testified that they might mean merely that certain savings which it was thought would be realized at later periods were being realized earlier. Ebasco concluded that this group of differences might indicate an understatement of net income in the Ebasco estimates of $460,000 for 1949, $410,000 for 1950, $350,000 for 1951, and $290,000 for 1952.

The Ebasco witness testified as to the possible effects of two additional developments which were not reflected in the Ebasco estimates, and which would raise the estimated costs of electric power production in certain years. First, it appeared unlikely that two new hydro-electric installations could be brought into operation by 1950 as had been contemplated under the estimated construction program. The expected delay of a year in the completion of these projects was estimated to mean an increase in steam generation and purchased power costs in 1950, with an estimated reduction of $380,000 from the net income estimate for that year. Second, there was a change in the contractual arrangements with a supplier of purchased power whereby firm power was to be delivered beginning in 1949, which had not been contemplated in the Ebasco estimates, this development having the effect of raising power costs and reducing net income by an estimated $390,000 for 1949, $650,000 for 1950 and $300,000 for 1951.

Summarizing then the cumulative results of all the factors discussed above, that is, the overestimates of operating expenses, the effect of the delay in the construction program, and the effect of changing certain secondary power to firm power, the Ebasco witness stated that the net changes in the Ebasco net income estimates would be an increase of $70,000 for 1949, a decrease of $620,000 in 1950, an increase of $50,000 in 1951 and an increase of $290,000 in 1952. However, considering the uncertainties involved, the impossibility of making estimates with any fine degree of exactness, and since net income itself is a result of estimates of much larger figures, the Ebasco witness stated that he preferred to give his more general conclusion, that on the then foreseeable variations, the Ebasco estimates of net income should be reduced for the year 1950 by $500,000 to $750,000, and that there would be no material variation from the estimates for 1949, 1951 and 1952.

In the light of the past three years' earning experience of the Niagara Hudson system and the Ebasco estimates, Niagara Hudson contends that it is reasonable to assume, on the basis of the initial capital structure of Class A and common stocks proposed for the New Operating Company, that the earnings available for such stocks will be not less than $17,500,000 annually, and that over the period to 1952 such available earnings should average an amount in excess of that figure.

[29]Ebasco recognized that the current practice of the company was to show as revenue only part of the billings and to carry the remainder in a deferred credit account, but, on the assumption that the interim rates would be finally approved, did not follow this practice in preparing the report.

The Committee representing first preferred stockholders of Niagara Hudson has criticized the use of estimates of future earnings for the purpose of testing the fairness of the plans, claiming that in general, and also with specific reference to the Niagara Hudson system, such estimates involve variables which make accurate prediction within a reasonable range well-nigh impossible. The Committee further attacks the Ebasco estimates on the grounds that they project earnings on an ascending scale in the future, are based on the investment of new capital and retained earnings in the future, and are not related to an estimated rate base. The Committee did not submit any estimate of foreseeable earnings although it did state that, for the purpose of testing certain aspects of the plans, it was willing to accept the estimate for 1949, made by Ebasco, of $17,506,000 as the earnings available for the common stock of the New Operating Company, assuming 100% conversion of the Class A stock. It added, however, that this estimate should be adjusted on a pro forma basis to reflect the portion of the holding company expenses which the New Operating Company would assume and the increase in federal income taxes due to the elimination of consolidated tax returns. These adjustments made by the Committee would reduce the Ebasco estimate to $17,109,000.

In inquiring into the reasonably foreseeable earnings prospects of the Niagara Hudson system, we are "in the realm not of mathematical demonstration, but of forecast" based upon a "weighting of a complex array of factors."[30] A "prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."[31] Thus the Ebasco forecast can at best be taken as an indication of the earnings potentialities of the Niagara Hudson system under the relatively favorable conditions which it has assumed. The Ebasco witness in charge of the preparation of the report recognized that no one can precisely forecast the future earnings potentialities of a company.

In view of the record of past growth and the evidence as to the prospect of further growth in the operating revenues of the Niagara Hudson system, it is reasonable to anticipate that there will be continued growth in the foreseeable future. To serve these increased demands adequately, the system will be required to make large expenditures for the construction of additional capacity and other facilities. While the extensive construction program anticipated both by Ebasco and Niagara Hudson indicates the opportunity and possibility of increased growth, a significant portion of the new facilities, however, are required to provide adequate reserve capacity for the present business of the system.

Although the operating conditions which the system will meet in the future cannot be predicted precisely, it is reasonable to anticipate that there will be a stabilization in costs so that increases in price levels and wage rates will no longer have an adverse effect on the system's earnings such as they have had in recent years. It is also to be anticipated that there will be a market improvement in the system's operating efficiency as a result of the introduction of the new facilities, particularly the new and highly efficient generating stations, which the company will add as part of its construction program.

The new facilities required to meet anticipated increases in demand, and to serve adequately the present demands on the system, will call for large amounts of new capital, including retained earnings. Thus, while a growth in the system's revenues and income may be anticipated, account must also be taken of the fact that not all of the future earnings will be attributable to the capital presently invested in the business.

As we have noted, Ebasco's forecasts were premised on the assumption that the period 1949 through 1952 will be a period of relatively high activity in most classes of the nation's business. While immediate prospects seem favorable, in making an estimate of earnings for the long-term future, we must necessarily take into account the possibility of changed economic conditions which might adversely affect such earnings. The effect on the system of a marked adverse turn in general economic conditions, however, might be modified by the fact that with a drop in demand the installation of additional plant might be postponed, thus reducing the need for new investment with its attendant

[30] *Iahti* v. *New England Power Association*, 160 F. 2d 845, 851 (C.A. 1, 1947).
[31] *Consolidated Rock Products Company* v. *DuBois*, 312 U.S. 510, 526 (1941).

costs, although at the same time it will take the company a longer time to reach the earnings level which the full program envisaged by Ebasco was designed to achieve.

Finally, an important factor in appraising the earnings prospects of the system is the limitations on earnings which result from rate regulation. The rates charged by the Niagara Hudson system companies are in the main subject to regulation by the Public Service Commission of New York. Thus, if other factors fail to restrict earnings within permissible limits, the possibility must be taken into account that action by a regulatory authority would be taken to reduce rates charged by the system.[32]

Both increases and decreases in electric rates for the period 1946-1948 have been effected by Niagara Hudson companies. No final determination has been made by the New York Commission, however, as to the rate base or allowable rate of return for any of the system properties.[33] The record includes tabulations showing the rates of return which the Ebasco forecasts of earnings would represent in relation to certain figures presented as bases for comparison. The base used for comparison for each year represented the average amount of utility plant in service stated at original cost, less a reserve for depreciation, estimated on a straight-line basis as approved by the New York Commission, plus an allowance for materials and supplies and operating expenses. Although these base figures were not presented as estimates of the Niagara Hudson rate base, it appears from decisions of the New York Commission that the approach of that Commission in finding a rate base would approximate that used in computing these figures.

Separate computations were presented for the electric and gas operations of the system. These show that the Ebasco forecasts of operating income from electric operations would be equivalent to a return, on the bases used for comparison purposes, of about 7% in 1949 and 1950, 7⅓% in 1951 and 7½% in 1952. The forecasts of operating income from gas operations show anticipated returns of only about 2% in 1949 and 1950, increasing to 4% in 1951 and 5% in 1952. On an aggregate basis, taking gas and electric operations together, Ebasco's forecasts of operating income would represent returns of 6½% in 1949, 6.4% in 1950, 7% in 1951 and 7.2% in 1952, on the assumed bases. While the problem of rate making is wholly outside the province of this Commission, it appears from decisions of the New York Commission that the indicated rates of return from electric operations are higher than that Commission would permit,[34] and that reductions in electric rates presently charged by the Niagara Hudson system may be required in the future.[35] Although the low indicated rates of return from gas operations suggest that the system may be entitled to increases in its charges for gas service, on balance, in view of the much greater importance relatively of the electric operations and the relatively high overall indicated rates of return from electric and gas operations combined, the possibility must be taken into account that rate changes which may be required in the future will limit the earnings possibilities of the system as forecast by Ebasco.

Niagara Hudson has contended that the use of the Ebasco estimates for future years is not unwarranted from the point of view of rate vulnerability, since the indicated rates of return represented by their estimates are within the range of recent Niagara Hudson experience, and since the rates charged by the system are relatively low. While it is true that during the years 1946 through 1948 the system realized overall rates of return, determined by application of the same base formula, which were as high or higher than those indicated by the Ebasco forecasts, this past experience is not necessarily controlling of what may be expected in the future. In this connection it should be noted that in recent years the New York Commission has been actively engaged, with respect to the Niagara

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[32] By the same token, the regulatory scheme would envisage rate relief in the event that earnings did not afford a reasonable return.

[33] Tentative rate bases for Buffalo Niagara and Niagara Falls were used by the New York Commission in proceedings in which Niagara Falls was granted interim rate increases pending final determination of the rate problems of that company. Case No. 12,878, September 22, 1948.

[34] For example, see decisions of the Public Service Commission of New York in *Matter of Staten Island Edison*, Cases 8,983 (1945) and 14,187 (1949).

[35] Of course, our statements in this connection, and the estimate of foreseeable earnings which we adopt, do not affect the rate making jurisdiction of the New York Commission and are not a forecast of or limitation on any future action of that Commission affecting the earnings of the system.

Hudson system, in proceedings involving the determination of the original cost of plant and the appropriate depreciation requirements, as well as various consolidation matters. The New York Commission's approval of the consolidation of three principal Niagara Hudson subsidiaries into the New Operating Company was based in part on the representation that that consolidation would permit approximately $1,000,000 of savings which would be passed on to consumers in the form of rate reductions.[36] That Commission went on to say that "A cursory study of the income statements of the various companies for 1947 and of the probable earnings of the consolidated company suggests that further reductions could well be made. When the company has been brought into existence and is operating as a new company further consideration should be given to the rate schedules and whether or not further reductions should be made."[37]

We have carefully examined all of the factors bearing on the future earnings of the Niagara Hudson system. We have found that the prospects for continued growth in revenues and for increases in income are favorable but that there are a number of factors which would tend to limit the extent to which this growth would be reflected in an increase in the earnings applicable to the present investment. Taking into account all factors, favorable as well as unfavorable, we conclude that for the purpose of testing the fairness of the plans, the reasonably foreseeable consolidated net income applicable to the Class A and common stock of the New Operating Company on the basis of the capital presently invested in the business may be estimated to average about $16,500,000 per year.

We emphasize again that our conclusion represents only an estimate of what might reasonably be expected to occur in the future, which is, under the best of circumstances, only an "appraisal of many factors which cannot be reduced to a fixed formula."[38] Thus, our estimate of foreseeable earnings does not mean that we believe that in any given year in the future net income attributable to the present investment will be realized in the same amount as that which we have estimated, but only that, in the foreseeable future, the earnings of the company will on the average so approximate such an amount that it may be appropriately employed for the purpose of testing the fairness of the proposed treatment of security holders."[39]

The Ebasco estimates, as we have seen, assumed dividend payments of $1.40 per share on the common stock of the New Operating Company through 1951 and of 75% of the applicable earnings in 1952. Earle J. Machold, president of Niagara Hudson, in his testimony indicated that the initial dividends on the New Operating Company common stock probably would be $1.40 per share annually. He further testified that a dividend payout of not less than 75 to 80% of the available earnings would be reasonable for a company like the New Operating Company, and added that it would be desirable to maintain a uniform dividend rate. Hopkinson also testified that $1.40 would probably be the dividend rate through 1950.

Our estimate of $16,500,000 as foreseeable earnings available for the Class A and common stock of the New Operating Company represents approximately $1.90 per share of common stock assuming no conversions of Class A stock, and $1.72 per share assuming 100% conversions. An annual dividend of $1.40 would represent payouts of approximately 74% and 81% of such earnings, respectively.

After a full consideration of all relevant factors, including the proposed construction program, we conclude that it is reasonable for the purpose of testing the plans, to estimate that annual dividend payments on the New Operating Company common stock will average $1.40 per share, with a prospect of a slightly higher level of dividend payments in the future when the construction program requirements and the need for retained earnings in connection therewith may lessen.

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[36] In consequence of such representations, the system in January 1949, put into effect rate reductions of approximately $1,000,000 which were reflected in the Ebasco forecasts.

[37] Case No. 12,733 (May 5, 1948).

[38] *Group of Institutional Investors* v. *Chicago M. St. P. R. R. Co.*, 318 U.S. 523 (1943).

[39] *Public Service Corporation of New Jersey*, —— S.E.C. —— (1948), Holding Company Act Release No. 8002, p. 32.

2. *Fairness to the Holders of the Preferred Stocks of Buffalo Niagara, Central New York and New York Power*

Under the plans, the holders of the preferred stocks of the three consolidating companies will receive in exchange for each such share of stock one share of preferred stock of the New Operating Company which will have the same dividend rate and other characteristics presently applicable to the stock surrendered, including the same preference to assets on voluntary or involuntary liquidation and the same redemption price. In addition, each such holder will be entitled to receive in cash an amount equal to the unpaid dividends accrued on his shares to the effective date of the consolidation.

As indicated earlier, the Public Service Commission of the State of New York has approved the proposed consolidation. No holder of preferred stocks of the three consolidating companies has appeared during the course of these proceedings and no security holder has objected to the Consolidation Plan.[40]

The following table shows certain pertinent information with respect to the assets and earnings of Buffalo Niagara, Central New York, New York Power and the New Operating Company, which bear on the investment quality of the securities of these companies.

[40] The preferred stocks of Central New York and New York Power were marketed on a specific representation that those companies might be parties to mergers or consolidations with other Niagara Hudson companies.

TABLE VIII

(000 omitted from dollar amounts)

	Buffalo Niagara and Subsidiaries Consolidated		Central New York		New York Power		New Operating Company and Subsidiaries Consolidated	
Capitalization and Surplus at December 31, 1948:								
Long Term Debt	$ 87,049	48.2%	$ 66,261	52.4%	$ 52,324[a]	52.7%	$205,633[a]	50.6%
Preferred Stock, Including Premium	35,497	19.7	20,030	15.8	24,554	24.7	80,081	19.8
Common Stock and Surplus	58,030	32.1	40,268	31.8	22,393	22.6	120,346	29.6
Total	$180,576	100.0%	$126,558	100.0%	$ 99,271	100.0%	$406,060	100.0%
Utility Plant, Other Assets and Related Ratios, at December 31, 1948:								
Utility Plant	$241,991	100.0%	$164,179	100.0%	$142,188	100.0%	$548,313	100.0%
Reserve for Depreciation	75,999	31.4	47,387	28.9	46,468	32.7	169,854	31.0
Net Utility Plant	$165,992	68.6%	$116,792	71.1%	$ 95,720	67.3%	$378,459	69.0%
Net Current Assets	8,529		3,998		561[a]		13,088[a]	
Investments and Fund Accounts	8,072		6,036		3,838		17,946	
Total	$182,593		$126,826		$100,119		$409,493	
Percent of Net Utility Plant:								
Long Term Debt		52.4%		56.7%		54.7%		54.3%
Long Term Debt and Preferred Stock		73.8		73.9		80.3		75.5
Percent of Net Utility Plant Plus Net Current Assets, Investments and Fund Accounts:								
Long Term Debt		47.7%		52.2%		52.3%		50.2%
Long Term Debt and Preferred Stock		67.1		68.0		76.8		69.8
Gross Operating Revenues for Calendar Year 1948:								
Electric	$ 58,518	100.0%	$ 32,937	77.1%	$ 30,603	82.1%	$121,118	88.2%
Gas	—	—	9,759	22.9	6,679	17.9	16,249	11.8
Total	$ 58,518	100.0%	$ 42,696	100.0%	$ 37,281	100.0%	$137,367	100.0%
Times Earned (Calendar Year 1948):								
Interest on Long Term Debt	3.36		4.91		4.53		4.17	
Income Deductions	3.85		5.58		4.57		4.60	
Income Deduction and Dividends on Preferred Stock	2.35		3.88		2.76		2.91	

[a] For purposes of this table, we have included in long-term debt $1,500,000 due within one year, and correspondingly we have excluded such amount in computing net current assets.

Buffalo Niagara derives all its revenues from electric operations while Central New York and New York Power derive a portion of their revenues from sales of gas, primarily natural or mixed gas in the case of the former, and manufactured gas in the case of the latter. Buffalo Niagara, however, is dependent on revenues from sales to industrial users to a greater extent than the other two companies.

As indicated in the table, the asset coverages for the debt and preferred stock of Buffalo Niagara and Central New York are higher than those for New York Power. With respect to earnings, the coverages for interest and preferred dividend requirements for each company are good, Central New York having the highest and Buffalo Niagara the lowest. In this connection, it appears that if effect for the full year 1948 were given to the rate increase granted in the latter part of the year to Buffalo Niagara's subsidiary, Niagara Falls, the coverage of income deductions and dividends on Buffalo Niagara's preferred stock would be 2.67 instead of 2.35 times.

Comparing the investment characteristics of each company with those of the New Operating Company, it appears that the Consolidation Plan will have no significant adverse impact on the position of the preferred stock.

The preferred stocks of Buffalo Niagara, Central New York and New York Power, which are all listed for trading on the New York Stock Exchange, have sold at prices reflecting very small differences in yields. The following table shows by months the average yield basis (the mean of the dividend yields at the high and low prices) at which each of these stocks have sold in the period January 1946 through June 1949.

TABLE IX

	Buffalo Niagara 3.60% Preferred Stock (a)	Central New York 3.40% Preferred Stock (b)	New York Power 3.90% Preferred Stock (c)
1946:			
January	3.49%	—	3.58%
February	3.42	—	3.53
March	3.38	3.35%	3.50
April	3.39	3.39	3.58
May	3.40	3.35	3.59
June	3.38	3.36	3.61
July	3.39	3.33	3.59
August	3.37	3.35	3.57
September	3.36	3.40	3.67
October	3.52	3.47	3.61
November	3.52	3.61	3.65
December	3.67	3.78	3.76
1947:			
January	3.59	3.70	3.74
February	3.55	3.58	3.70
March	3.54	3.67	3.68
April	3.53	3.54	3.70
May	3.54	3.62	3.70
June	3.57	3.62	3.71
July	3.56	3.64	3.72
August	3.58	3.69	3.79
September	3.59	3.71	3.79
October	3.69	3.81	3.91
November	3.96	4.15	4.06
December	4.25	4.30	4.35
1948:			
January	4.22%	4.27%	4.39%
February	4.12	4.28	4.31
March	4.13	4.27	4.35
April	4.10	4.28	4.26
May	4.15	4.16	4.22
June	4.09	4.14	4.18
July	4.24	4.23	4.22
August	4.43	4.28	4.30
September	4.39	4.35	4.31
October	4.39	4.52	4.41
November	4.38	4.49	4.40
December	4.18	4.25	4.24
1949:			
January	4.05	4.11	4.16
February	4.00	4.14	4.13
March	4.01	4.08	4.16
April	4.09	4.20	4.19
May	4.09	4.24	4.20
June	4.08	4.20	4.19

(a) Issued in January 1946 at an initial public offering price of $102.85, or a yield of 3.50%.
(b) Issued in March 1946 at an initial public offering price of $101.50, or a yield of 3.35%.
(c) Issued in May 1945 at an initial public offering price of $104.00, or a yield of 3.75%.

As the above table shows, the differences in average yield bases at which the stocks have sold in any month have been relatively insignificant. In 1946, the differences ranged from .09 of one percent to .31; in 1947, from .10 of one percent to .22; in 1948, from .02 to .22; and in 1949, from .11 to .15.[41]

In connection with the possible effect of the Dissolution Plan upon the preferred stockholders of the three subsidiaries, it does not appear that the issuance of Class A stock would adversely affect the outstanding debt and preferred stock of the New Operating Company, or that it would adversely affect any future financing by the issuance of additional debt or preferred stock. We have previously noted that the aggregate stated value attributable to the Class A stock and common stock will be the same as that which is initially applicable to the common stock of the New Operating Company as proposed in the Consolidation Plan, so that the equity underlying the outstanding debt and preferred stocks of the New Operating Company will not be reduced by the issuance of Class A stock.

In the light of all the circumstances, and on the basis of our independent consideration of all the pertinent factors, we find that the proposed plans are fair and equitable with respect to the preferred stockholders of Buffalo Niagara, Central New York and New York Power.

3. *Fairness to the Preferred Stockholders of Niagara Hudson*

As we have noted, the rights to be surrendered by the Niagara Hudson preferred stockholders include (a) a preference over common stockholders with respect to cumulative annual dividends of $5 per share; (b) a preference over common stockholders in the event of liquidation in the amount of $100 and accrued dividends; and (c) a right in the event of redemption to receive payment of $107.50 plus accrued dividends. In addition, the holders of the first preferred stock are entitled to have their preference to dividends and assets satisfied before any payments are made to the holders of the second preferred stock.

These contractual rights of the preferred stockholders apply to a portfolio which consists almost exclusively of common stocks of public utility operating companies which have outstanding substantial amounts of debt and preferred stocks. As shown by Table III above, these senior securities represented as of December 31, 1948, about 68% of consolidated capitalization and surplus. The preferred stocks are also junior to the Niagara Hudson bank loans which as of the same date were outstanding in the amount of $20,000,000 and constituted about 5% of consolidated capitalization and surplus. Of the remaining 27% of consolidated capitalization and surplus applicable to Niagara Hudson's securities, 9% and 2½% were applicable to the first and second preferred stocks, respectively, and about 16% to the common stock. As earlier noted, it is indicated that the bank loans will be completely paid off by the end of 1950 through the application of retained earnings. If effect were given to this prospective payment, the common stock equity junior to the Niagara Hudson preferred stocks would be increased, as of December 31, 1948, to about 21%.

As shown by the corporate balance sheet in Appendix A, at December 31, 1948, Niagara Hudson carried its investments in subsidiaries at $108,142,838. This compares with the underlying book values of such investments at that date of $134,233,363. These figures, of course, do not purport to be the fair value or realizable value of such assets. It appears reasonable, however, to assume that the value of Niagara Hudson assets would not be less than the figure given for their underlying book value. On this basis, after allowing for the $20,000,000 of bank loans outstanding at December 31, 1948, Niagara Hudson's net assets would have a value about 3 times the liquidation preference of the first preferred stock and about 2.4 times the liquidation preference of the first and second preferred stock combined.

The Niagara Hudson preferred stock dividend requirements have been earned on a consolidated basis every year since the issuance of the stock, with a marked improvement in coverages since 1945.

[41] It is possible, of course, that the pendency of the Consolidation Plan may have influenced the prices at which these stocks have sold. The proposed consolidation was announced to preferred stockholders in September 1946, when application for its approval was filed with the New York Public Service Commission. That Commission announced its approval of the proposed consolidation in May 1948, after which the present proceedings were instituted.

We have noted that such dividends have been paid regularly except for the period beginning in 1942 when dividend payments were suspended due to a contingent capital impairment resulting from possible accounting adjustments with respect to the accounts of subsidiary companies. Dividends are now being paid regularly on both the first and second preferred stocks, and all arrearages also have been paid. While the preferred stockholders of Niagara Hudson have a relatively junior position in the system, assuming the continuance of Niagara Hudson in its present condition, it is reasonable to expect that Niagara Hudson's income would be such that the preferred stockholders would continue to receive the $5 annual dividend.

Hopkinson and Woods, testifying in support of the plans, indicated that the Niagara Hudson preferred stocks are "reasonably good" or "fair" investment grade securities, while Ralph E. Sterling, testifying as an expert financial witness for the Committee, was of the opinion that the Niagara Hudson first preferred stock is a medium grade security. The market history of the Niagara Hudson securities, including the preferred stocks, is set forth in Appendix F.

Under the plans, Niagara Hudson first preferred stockholders will receive in exchange for each share of first preferred stock, four shares of Class A stock of the New Operating Company with cumulative annual dividends of $1.20 per share. In addition, they will have the privilege of converting such Class A stock into common stock of the New Operating Company at the rate of one share of Class A stock for 1.1 shares of common stock during the first three-year period and on a share for share basis during the second three-year period. The preferred stockholders thus will retain their preference as to a fixed cumulative dividend, but in an aggregate amount of $4.80 per share of preferred stock instead of their present rate of $5 per share. However, they will hold securities in an operating company instead of in a holding company, although it does not appear that there will be any significant change in overall earnings coverages.[42]

Although under the plans the first preferred stockholders will lose their present preference to assets upon liquidation, they will be protected against a voluntary liquidation or dissolution, or a sale of all or substantially all of the property, by the requirement that any such action cannot be taken without the consent of two-thirds of the outstanding Class A stock. Also, these stockholders, presently entitled to less than 4% of the voting power, will receive securities representing approximately 16% of the total voting power, which could become about 17% upon full conversion into common stock. The Class A stock will be callable at $26.875 per share,[43] so that four shares of Class A stock will have a call price of $107.50, the same as the call price for one share of Niagara Hudson preferred stock.

We have noted that each share of the Class A stock will be convertible into 1.1 shares of common stock during the first three-year period and into one share of common stock during the next three-year period. Accordingly, during the first three years, a first preferred stockholder could convert his Class A stock into 4.4 shares of New Operating Company common stock for each share of preferred stock. The earnings that would be applicable to the common stock, on the basis of reasonably foreseeable annual earnings of $16,500,000 for the Class A and common stocks combined, would vary as follows, depending on the extent of conversions:

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[42] On a consolidated basis Niagara Hudson's income for 1948 covered all prior charges and dividends on the first preferred stock 2.13 times, and all prior charges and dividends on the first and second preferred stocks 2.02 times. Niagara Hudson presented pro forma figures for the year 1948 showing on a consolidated basis a times-earnings coverage of all prior charges and dividends on the Class A stock of 2.26 times. These figures made no allowance for the elimination of the consolidated tax return and the assumption by the New Operating Company of certain holding company expenses. Making adjustment in the pro forma figures for these factors, it appears that the pro forma coverage for dividends on the Class A stock would be 2.17 times as compared with the coverages of 2.13 times for the first preferred stock and 2.02 times for the first and second preferred stocks combined. It should be noted also that the pro forma figures do not include as prior charges the interest payments on the Niagara Hudson bank loans, whereas the actual figures do. The slight improvement in coverages of the Class A stock over the first preferred stock indicated by the pro forma figures will disappear with the elimination of the interest expense upon the retirement of the Niagara Hudson bank loans. Although, as we have noted earlier, the New Operating Company probably will have a somewhat higher income than Niagara Hudson would have if it were to continue, this will be offset in the case of the coverage for the first preferred by the fact that the Class A dividend preference will total $2,327,000, whereas the first preferred dividend requirements total only $1,894,000. In considering the coverage of the second preferred dividend requirement, however, this offsetting factor would not apply because the dividend requirements on the first and second preferred stocks combined aggregate $2,424,000.

[43] In our earlier discussion under necessity, we concluded that it would be appropriate to provide that the Class A stock may be called at any time. Niagara Hudson has agreed to make such a modification, and our discussion of fairness is based on the assumption that the plans will be so modified.

TABLE X

	Assuming following Conversions of Class A Stock		
	None	65%	100%
Earnings Available for Class A and Common Stock	$16,500,000	$16,500,000	$16,500,000
Dividend requirements on Class A stock	2,327,064	814,472	—
Balance Available for Common Stock	$14,172,936	$15,685,528	$16,500,000
Number of Shares of Common Stock Outstanding	7,473,172	8,859,714	9,606,314
Earnings per share of Common Stock	$1.90	$1.77	$1.72

As distinguished from his present limited claim to net income of $5 per share per year, a Niagara Hudson first preferred stockholder upon conversion within the first three-year period will receive securities representing an interest in prospective net income ranging from a minimum (assuming 100% conversion) of $7.57 per share of preferred stock, to a maximum (assuming no conversions) of $8.36. On the basis of the assumed reasonably foreseeable dividend rate of $1.40 per share of common stock, he would have, in the event of such conversion, instead of his present right to a limited cumulative dividend of $5 per year, a reasonable prospect of receiving dividends of $6.16 per year, with no limitation on his right to participate in any increased earnings and dividends.

While, as Table X indicates, the applicable earnings per share of common stock will be reduced as conversions are made, the quality of such earnings will be improved as a result of the reduction of the Class A dividends which will be prior charges. Conversions will also have a beneficial effect on the Class A stock not converted, since with a smaller number of such shares outstanding, there will be improved earnings coverages.

With regard to the probability of conversions, it is to be noted that, on the basis of the anticipated initial annual dividend of $1.40 on the common stock of the New Operating Company, conversion during the first three-year period would increase the dividend income from $1.20 to $1.54, or an increase of approximately 28%.

Machold testified that the conversion feature was designed with a view, among other things, to attracting a maximum conversion within the initial three-year period with the possibility of ultimate elimination of the Class A stock from the security structure. He testified also that substantial conversions would probably not occur until the common stock approached a market price of $24 or $25 per share. All the financial witnesses agreed that under present market conditions the market price of the Class A stock, which is callable at $26.875 per share, would not be less than $25 per share. Hopkinson and Woods agreed with Machold that there would be substantial conversions by the end of the first three-year period, assuming that the improved earnings forecast for future years were realized and that there were no adverse changes in existing market conditions. Both Hopkinson and Woods anticipated that under these conditions the market price for the common stock would be as high as $24 or $25 per share. The Committee, on the other hand, has argued that conversions are not likely, and its witness, Sterling, testified that in his opinion under present market conditions the seasoned market price of the common stock would be no higher than $21.50 per share.

After due consideration, we think it is reasonable to anticipate that the common stock in the future will attain market prices which, in combination with the enhancement in dividend income, the decline of the conversion rate at the end of the three-year period, and the right of redemption, will furnish a reasonable prospect of conversions.[44]

[44] It is to be expected that there are a number of preferred stockholders whose primary interest is in maintaining greater security of income rather than enhanced yield and who presumably would be reluctant to convert even when the price relationship of the Class A and common stock is favorable to conversion. Under favorable market conditions, however, when the common stock reaches a market level in excess of $24.43 per share, so that 1.1 shares of common will have a value in excess of the redemption price of the Class A, it will be possible for the company to force conversions by calling all or a portion of the Class A stock.

As previously stated, representatives of the first preferred stockholders have objected to the plans as not being fair to them. They object, in the main, to three features of the plans: (1) the reduction of 4% from their present dividend rate of $5 a year to the proposed $4.80; (2) the loss of their present preference as to assets in the event of liquidation; and (3) the failure to make any distinction between the treatment proposed for the first preferred stock and that proposed for the second preferred stock.[45]

It is true that, as holders of the Class A stock, the holders of the Niagara Hudson preferred stock will have a slightly reduced preference to dividends and will have no preference to assets on liquidation.[46] They will, however, receive in exchange securities in an operating company instead of a holding company, with increased voting power, and with a right to convert their holdings into common stock on a basis which will give them a substantial increase in their participation in earnings and dividends over that presently enjoyed, and the right to benefit directly and without ceiling in the future growth of the system. In addition, the Class A stock will be senior to the Niagara Hudson bank loan, whereas the preferred stock would continue to be junior to that debt for the period required to retire such loan. Furthermore, as conversions occur, there will be an improvement in the quality and earnings coverages of the remaining Class A stock.

The Committee has filed a "plan" of its own, in which other representatives of first preferred stockholders have joined. The Committee's plan, however, is merely a statement of the modifications which the Committee considers necessary to make the Niagara Hudson plans fair to first preferred stockholders.[47]

In this connection we note that the Committee's proposals seem to be based, among other things, on the assumption that fairness requires that the first preferred stockholders receive securities which will have an immediate market price at least equal to the redemption price of the first preferred stock, $107.50 per share. The Committee contends that $107.50 per share is the investment value of the first preferred stock[48] and that the plans are designed to give first preferred stockholders securities

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[45] We have previously noted two other objections raised by the first preferred stockholders, (1) that there was no requirement of a two-thirds vote of the Class A stock in the event of a sale of property, and (2) that the Class A stock was not protected against dilution of the common stock. We have commented on these criticisms in our discussion on necessity, and there reached the conclusion that appropriate modifications should be filed to make the consent of holders of two-thirds of the Class A stock a prerequisite to any sale or transfer of all or substantially all of the property of the New Operating Company, and to protect the Class A stockholders against sales of common stock at prices substantially below market prices. Niagara Hudson has indicated it will make such modifications, and our discussion of fairness is based on the assumption that they will be made.

[46] In considering the importance of the loss of the liquidation preference, it should be noted that even the Committee appears to have conceded that the possibility of liquidation of an operating utility such as the New Operating Company is remote. The only suggestion of such a possibility made by the Committee was based on the compound possibility that the St. Lawrence River power project might be developed and that, if such development occurred, the properties of the company might be purchased or condemned by a government agency. Without expressing any opinion as to whether these events will occur in the future, we do not think that these possibilities are entitled to significant weight in connection with a consideration of the fairness of the plans. This conclusion is further fortified by the fact that the Committee contention that the loss of the liquidation preference might have a detrimental effect necessitates adding a third assumption posed by the Committee, namely that the purchase price or condemnation award for the properties would not exceed their book value, in which event the pro rata distribution to the preferred stockholders would be equivalent to about half of their present liquidation preference. Finally, we note that in any event the approval of holders of two-thirds of the Class A stock would be a prerequisite to sale of the properties, or to any liquidation by way of distribution of the purchase price or condemnation award, and, as a practical matter, it may be assumed that such approval would not be forthcoming unless the Class A stockholders concluded that they were being fairly treated vis-a-vis the common stockholders.

[47] The Committee proposed that (1) the annual dividend rate on the Class A stock be increased from $1.20 per share to $1.25; (2) the conversion rate in the first three-year period be 1 share of Class A stock for 1.25 shares of common stock, and 1 for 1.125 during the second three-year period; (3) second preferred stockholders receive for each such share 3.75 shares of Class A stock and 1/5 share of common stock; and (4) common stockholders receive for each such share .75 share of new common stock. Since, as we indicate later, we find the Niagara Hudson plans to be fair, subject to a modification in the allocations for second preferred stockholders, the Committee's proposals cannot be accepted.

[48] Hopkinson was not prepared to say that the first preferred stock had an investment value of $107.50 per share, although he was of the opinion that it probably had a value at least equal to the liquidation preference of $100 per share. The Committee has contended that the market value of the first preferred stock has been depressed because of the uncertainties of reorganization and argues that if Niagara Hudson were to continue free from the provisions of Section 11 of the Act, the price of the stock normally would be around $107.50.

with a market price about equivalent only to the liquidation preference of the first preferred stock, or $100 per share, which is also the price around which the first preferred stock has been selling recently.[49]

In this connection, we emphasize that, in measuring the rights which the preferred stockholders will receive under the plans to determine whether they are the equitable equivalent of the rights being surrendered, we have not attempted nor is it necessary to fix a specific value in dollars for the preferred stock or the new securities to be received in exchange therefor.[50] Where a security holder's interests are to be retired by exchanging them for new securities in a continuing enterprise, we must measure the rights to be surrendered and the rights to be received in exchange. Recognizing the inherent complexity of this problem, the Supreme Court has held "that a security holder may be accorded the equitable equivalent of the rights surrendered without placing a dollar valuation upon either the rights surrendered or the securities given in compensation therefor."[51] As the Supreme Court said in the same case, in this situation our task, in effect, is to apportion to the security holders "earning power substantially equivalent to that being surrendered." So, while we have given consideration to all factors, our appraisal of the proposed exchange has given primary consideration to the extent and quality of the prospective earnings coverage for and dividends applicable to the preferred stock in relation to the prospective earnings and dividends applicable to the new securities.[52] That preferred stockholders will receive securities which will have an immediate market price approximately the same as the market price at which their stock has recently been selling is a factor which indicates only that such of those security holders who wish or may be forced to dispose of their new securities in the near future will not suffer a hardship marketwise as a result of the plans. While this is a factor which would make the plans more acceptable to preferred stockholders, and which was of significance in our discussion of necessity,[52a] it has not been the test we have used in determining the fairness of the plans. Our conclusion regarding fairness, as we have pointed out, is rather dependent primarily upon our analysis of prospective earnings and dividends.[53]

Upon a full consideration of the record, we have concluded, subject to a modification such as that which we discuss below in connection with the proposed treatment of second preferred stockholders, that the proposed allocations to the first preferred stockholders provide them with the equitable equivalent of the rights they are surrendering.

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[49] All the financial witnesses agreed that under present market conditions the market price of the Class A stock would not be less than $25 per share. Sterling forecast an initial price of $25.25, which in his opinion would be substantially the same as the seasoned price, whereas Hopkinson and Woods estimated that in time the stock would sell at higher prices ranging to $26.875 and $28.20 per share, respectively. Thus, four shares of Class A stock would have an initial market price of $100-$101, compared to the liquidation preference of $100 per share of first preferred stock and recent market prices in the neighborhood of $100 per share.

[50] *The United Corporation*, —— S.E.C. —— (1948), Holding Company Act Release No. 8396.

[51] *S.E.C.* v. *Central Illinois Corp.*, —— U.S. —— (1949), citing also *Otis & Co.* v. *S.E.C.*, 323 U.S. 624 (1945).

[52] While we have not attempted to fix specific dollar values in testing the fairness of the plans, it may be noted that the $7.57 of foreseeable earnings applicable to four shares of Class A stock upon conversion into 4.4 shares of common stock would have a value equal to the preferred stock's liquidation preference if capitalized at 13.2 times earnings and a value equal to the redemption price if capitalized at 14.2 times earnings. The anticipated common stock dividend payments of $6.16 amount to returns of 6.16% and 5.73% of such liquidation and redemption figures, respectively. In our opinion, considering the relatively good investment quality of the New Operating Company common stock, upon full conversion of the Class A stock, such times earnings factors and dividend yields are not inappropriate as measures of the long-term investment value of that stock.

[52a] The dissenting opinion, in taking issue with the significance we have given to the utility of the Class A stock as avoiding a hardship marketwise, has pointed out that the pendency of a reorganization plan generally influences the market prices of a company's securities. However, it has not contended, and we do not believe it can be reasonably contended, that the pendency of the plans in this case has caused the market prices of the preferred stock to be higher than they would otherwise be. In the absence of such a contention, it can not be denied that the plans avoid a market hardship.

[53] The Committee's emphasis on immediate market prices of the new securities and its attacks on the use of long-term prospective earnings estimates seem to be based, in part at least, upon a misinterpretation of our recent decision in *Electric Power & Light Corporation*, —— S.E.C. —— (1949), Holding Company Act Release No. 8889. The Committee apparently feels that in the *Electric* case we departed from our established policy of using estimates of reasonably foreseeable long-term earnings as a basis for testing the fairness of a Section 11 (e) exchange plan. This misconception seems to have arisen from the fact that in the *Electric* case we rejected certain earnings forecasts for the years 1948 through 1952 as a basis for testing fairness, and accepted instead estimates for 1948 submitted by the company. However, we rejected the 1948-1952 estimates, not because they were estimates for future years, but because they were subject to certain infirmities which made them unacceptable. And our acceptance of the company's 1948 estimates was not an indication that we were testing fairness by looking only at earnings immediately realizable; on the contrary, the 1948 estimates had been represented to be and were adopted by us as "a reasonable approximation of the average foreseeable future earnings . . . applicable to the capital presently invested in the business."

As we have previously indicated, subject to the priority of the first preferred stock, the rights of the second preferred stock to dividends and on liquidation or redemption are the same as those of the first preferred stock. Under the plans it is proposed that the first and second preferred stockholders receive identical treatment.

It is not disputed that the first preferred stock has an investment value slightly higher than the second, in view of its priority over the second to dividends and assets, and its resulting higher quality and coverages. Thus, for example, Niagara Hudson's gross income for 1948 covered charges prior to the preferred stock 2.61 times, the dividend requirements on the first preferred stock and charges prior thereto, 2.13 times, and the dividend requirements on the first and second preferred stocks combined plus prior charges, 2.02 times. In considering the difference in quality between the two stocks, it is not sufficient simply to compare the overall earnings coverage of 2.13 times for the dividend requirements on the first preferred stock with the overall coverage of 2.02 times for the second preferred stock, for such a comparison would minimize the important fact that the charges senior to the second preferred stock dividend are relatively much greater than the charges senior to the first preferred stock dividend. In order to fully appreciate their qualitative difference earnings-wise, the difference and extent of coverages for charges senior to the dividend requirements of each of these issues must also be recognized. Stated as percentages of gross income, charges senior to the dividend requirements on the first preferred stock consumed 38.3% of Niagara Hudson's gross income in 1948, whereas charges senior to the dividend requirements on the second preferred stock consumed 47% of such income.[54]

That the priority of the first preferred stock over the second to payment of dividends can be of practical importance was illustrated when dividend payments on both stocks were suspended in 1942. Although such payments were suspended for technical reasons and earnings were sufficient to cover the dividend requirements, the dividend payments on the first preferred stock were resumed two years before payments were resumed on the second, and the arrearages on the first were also paid before those on the second.[55]

The market prices for the Niagara Hudson preferred stocks, as shown in Appendix F, indicate a difference between the market valuations for the two classes. Although comparisons during the period 1946-1948, inclusive, are complicated by differences in dividend treatment and arrearages, it is clear that on the average the market prices for the first preferred stock have been appreciably higher than those for the second preferred stock, although the spread between the two has been less in recent years than it was in the past.[56] Based on our estimates of foreseeable earnings for the system, if Niagara Hudson were to continue, dividend payments on the second preferred stock as well as on the first would be reasonably well covered, and although one would not expect the second preferred stock to sell on the same basis as the first, it could reasonably be anticipated that, as a record of regular dividend payments became established, the difference in market price between the two would be narrowed.

The only justification suggested for equal treatment of the two classes are, first, that the difference between them is small and in the nature of *de minimis*, and second, that it is desirable to avoid further complicating the security structure of the New Operating Company in an attempt to differentiate between the two preferred stocks. We do not agree with either of these arguments. The difference in value between the two stocks, while not great, is sufficient to call for a difference in treatment, and such differentiation can be effected without adding any further complications to the security structure of the new company. This can be done by giving the second preferred stockholders a slightly smaller

[54] In view of the relatively small dividend requirements on the second preferred stock, as the coverages become more ample, the qualitative differences resulting from the differences in priority diminish in importance. Thus we see that differences in the market prices of the two stocks became narrower in the period 1946 through 1948, when coverages improved, than they were in the period 1937-1945 when the coverages were rather meager.

[55] Also, just prior to the creation of the present Niagara Hudson in 1937, there were dividend arrears on the predecessor company's second preferred stock of $25.09 per share, which had accumulated since 1933. At least a partial dividend payment on the predecessor company's first preferred stock was made in every year, so that by 1937 there were arrears of only $4 per share on this stock.

[56] Even in 1949, notwithstanding the pendency of these plans which propose identical treatment for the two classes, the first preferred stock has sold at prices ranging from a high of 100½ to a low of 94½, while the high and low prices for the second preferred stock have been 96¼ and 92⅝, respectively.

number of shares of Class A stock per share of preferred stock. In the light of the factors we have analyzed with respect to the first preferred stock, and having in mind the differences between the first preferred and the second preferred stock, we conclude that the plans would accord fair treatment to second preferred stockholders if modified to provide that such stockholders receive 3.9 shares of Class A stock for each share of preferred stock.

4. *Fairness to the Niagara Hudson Common Stockholders*

We have found that the plans, subject to certain modifications, would be fair and equitable to the Niagara Hudson preferred stockholders. Since the fair and equitable standard requires that the senior security holder must receive the equitable equivalent of the rights surrendered before the junior security holder may receive anything, it follows that after the full priorities of the preferred stockholders are satisfied, the junior interests necessarily are given fair and equitable treatment when they receive the balance of Niagara Hudson's assets.

Under the plans, a Niagara Hudson common stockholder in effect is given a choice of one of two options: (1) to forego receiving dividends on his present stock or new securities in exchange for such stock until the Niagara Hudson bank loan has been retired, which Machold estimated would be at the end of 1950, and at that time to receive his pro rata share of the New Operating Company common stock then held by Niagara Hudson; or (2) at any time within six months after the effective date of the Dissolution Plan, to receive his pro rata share of New Operating Company common stock in exchange for his Niagara Hudson common stock and a payment of cash representing his pro rata share of the Niagara Hudson bank loan outstanding at the effective date, estimated by Machold to be $1.60 per share of Niagara Hudson common stock as of July 1, 1949, and $1.20 as of December 31, 1949.

Since issuance of the common stock in 1937, common stockholders have received dividends totalling only 80¢ per share, the last dividend being a payment of 15¢ per share in 1940.[57] At present, the Niagara Hudson bank loan agreement prohibits the payment of dividends on Niagara Hudson common stock until the bank loan has been retired. Under the plans, common stockholders remain in virtually the same position as they are now until the bank loan is paid, but those who desire to be in a position to receive dividend income immediately after the effectuation of the plans will be able, by paying their proportionate share of the bank loan, to receive common stock of the New Operating Company which will not be subject to the restriction on payment of dividends.

We have previously found that the reasonably foreseeable annual net income of the New Operating Company applicable to the Class A and common stock of that company will be $16,500,000 and that the comparable net income of Niagara Hudson if it were to continue in existence would be somewhat less. If we assume that Niagara Hudson's net income, if it continued would be approximately $750,000 less than that of the New Operating Company, using such figure merely for purposes of illustration and recognizing that the difference may be somewhat higher or lower, there would be $15,750,000 per year available for the Niagara Hudson preferred and common stock. After deducting the Niagara Hudson preferred stock dividend requirements of $2,424,000, this would represent earnings available for the present 9,580,988 shares of Niagara Hudson common stock of $1.39 per share. This is to be compared with earnings, applicable to the .78 shares of New Operating Company common stock which under the plans would be exchanged for one share of Niagara Hudson common stock, ranging from $1.48 assuming no conversions of Class A stock, to $1.34 assuming 100% conversions.[58] Thus, prior to conversions, Niagara Hudson common stockholders would have rights in a larger amount of earnings than they presently enjoy and would also hold securities in an operating company instead of a holding company. As the amount of conversions increases to 100%, the per share earnings will become somewhat less; but the quality of such earnings will be improved since prior charges will be accordingly reduced.

[57] From 1929 to 1937, dividends totalling $4.85 were paid on the predecessor company common stock.

[58] As shown by Appendix C, earnings per share of common stock were $1.[illegible] in 1948, and the highest such earnings for any year were $1.42 in 1946.

Having found the plans to be fair to the Niagara Hudson preferred stockholders, and having considered the earnings and dividend position of the Niagara Hudson common stockholders as against their prospects under the plans, including the fact that they will have an interest in an operating company as distinguished from their present interest in a holding company, we conclude and find that the plans are fair and equitable to such common stockholders.

5. *Fairness to the Holders of the Class B Stock Option Warrants of Niagara Hudson*

Under the plans, no provision is made for participation of the Class B stock option warrants of Niagara Hudson and all rights represented by such warrants will terminate upon the dissolution of that company.

The option warrants entitle their holders to purchase at any time 497,191⅜ shares of Niagara Hudson common stock, each warrant entitling the holder to 1⅛ shares upon payment of $50. This is equivalent to an exercise price of $42.86 for one share. Since 1932, the Niagara Hudson or predecessor company common stock has never sold at a price higher than 18¼ and has sold as low as ⅞. During the same period, the option warrants have never sold higher than 5 and have been as low as ⅛. In 1948, the prices for the option warrants ranged from a high of 1 to a low of ⅛, and in 1949, from a high of ¼ to a low of ⅛.

In considering the participation to which option warrant holders may be entitled, the test is basically the same as that applied with respect to the other types of securities, that is, what value, if any, is being given up by the surrender of the rights attaching to that security. The price of $42.86, which a holder of an option warrant would have to pay for one share of Niagara Hudson common stock, is more than 30 times the estimate we have used of $1.39 as foreseeable earnings which would be applicable to that stock on the basis of present investment if Niagara Hudson were to continue. That price is about 2.5 times the recent high market prices for the Niagara Hudson common stock of around 12 per share.

If we were to assume that Niagara Hudson were to continue and its common stock were to sell in the future at a ratio of 15 times consolidated earnings, which would appear to be a very liberal assumption, it would require per share earnings of $2.86 to result in a price of $42.86 per share. Such earnings would represent an increase of 106% over the approximately $1.39 of earnings which we have found attributable to the present investment. On the basis of the more likely assumption that the price-earnings ratio at which the Niagara Hudson common stock would sell would be something less than 15 times, an even greater increase in earnings would be required to attain a per share price of $42.86.

Under all the circumstances, we cannot find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future. Accordingly, we find that such option warrants have no recognizable value[59] and that the plans satisfy the standard of fairness and equity with respect to such option warrants in excluding them from any participation in the reorganization of Niagara Hudson.

C. **Other Matters Considered**

1. *Fees and Expenses*

The plans provide that Niagara Hudson will pay such fees and expenses in connection with the plans as are approved by us. Until the record contains sufficient information concerning fees and expenses in connection with these proceedings, we shall reserve jurisdiction over the payment by Niagara Hudson of such fees and expenses.

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[59]We recognize that the holders of the option warrants have a right to purchase common stock at any time, and that this perpetual feature has some present value no matter how remote or speculative the exercise of the right might be. The value to be accorded that right, however, in this case, is so small that as a practical matter we would not be justified in recognizing it for the purposes of a Section 11 reorganization. *Cf. Electric Power & Light Corporation*, —— S.E.C. —— (1949), Holding Company Act Release No. 8889.

2. *Tax Recitals*

In accordance with Niagara Hudson's request, and in the event the plans are modified in the manner previously described, our order of approval will recite, in accordance with the requirements of the Internal Revenue Code as amended, including Section 1808 (c) thereof, that the transactions under the plans as approved are necessary or appropriate to effectuate the provisions of Section 11 (b) of the Act.

3. *Listing of Securities of the New Operating Company*

As indicated by the representations to that effect contained in the plans, it is anticipated that the three series of preferred stock of the New Operating Company will be listed on the New York Stock Exchange as soon as possible after the effective date of the Consolidation Plan, the preferred stocks of the consolidating companies presently being so listed. Also, it is contemplated that at an appropriate time after the effective date of the Dissolution Plan, application will be made to list the Class A and common stocks of the New Operating Company on the New York Stock Exchange. The Niagara Hudson preferred and common stocks are presently listed on the New York Curb Exchange.

Although it is provided that the preferred stock of the New Operating Company will be listed on a national securities exchange as soon as possible after the effective date of the Consolidation Plan, application for listing of the Class A and common stocks is to be made at an "appropriate" time, and Machold testified that no definite plans had been made regarding such listing. We see no reason why steps could not be taken immediately after the effective date of the Dissolution Plan to list the Class A stock on a national securities exchange as soon as is possible in conformity with the rules of such exchange, and the plan should be amended to so provide. Immediate steps to list the common stock of the New Operating Company, on the other hand, might not be appropriate, in view of the uncertainty of the timing of the public distribution of such stock, tied up as it is with the payment of the Niagara Hudson bank loan. Nevertheless, listing of this stock should not be delayed any longer than necessary, and the plan should also be amended to provide that steps be taken to list the New Operating Company common stock on a national securities exchange as soon as the rules of such exchange will permit.[60]

4. *Court Enforcement*

Niagara Hudson has requested that we apply to the United States District Court for the Northern District of New York to enforce and carry out the terms and provisions of the plans pursuant to Section 11 (e) of the Act. If the plans are amended in the manner indicated herein, our order will provide for such an application, and will also provide that it is not to operate as authorizing or directing the consummation of the plans until such a court order has been entered.

5. *Rulings on Proposed Findings and Exceptions*

To the extent that the proposed findings and exceptions filed by participants in these proceedings involve issues which are relevant and material to a decision of this case, we have by our detailed Findings and Opinion herein already fully ruled on them. For the sake of clarity, however, we hereby expressly approve them to the extent they are in accord with the views set forth herein, and disapprove them to the extent that they are inconsistent with such views.

6. *Effective Date of Order*

Because effectuation by Niagara Hudson of its program for complete compliance with our 1945 order, and with the requirements of Section 11 (b)(2) of the Act, is contingent upon the disposition of these proceedings, we find if the plans are amended in accordance with our views, that it is inappro-

[60] *Cf. Electric Power & Light Corporation*, —— S.E.C. —— (1949), Holding Company Act Release No. 8889.

priate to delay for 30 days the effective date of an order of approval and that good cause exists for making such order effective immediately upon its issuance.[61]

VI. CONCLUSION

For the reasons stated above, we have concluded that we can approve the plans if they are modified as noted herein. If within twenty days from the date of this opinion (or such additional time as may be granted on application) the plans are so modified, we shall enter an order approving them, subject to the reservation of jurisdiction noted above.

By the Commission (Chairman Hanrahan, and Commissioners McDonald, and Rowen), Commissioner McEntire filing a dissenting opinion, attached.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

August 16, 1949.

[61] Consummation of the plans will not in any event be effected immediately after entry of our order, since it will be conditioned upon approval by a United States District Court in proceedings which normally require at least 30 days.

APPENDIX A

NIAGARA HUDSON POWER CORPORATION AND SUBSIDIARY COMPANIES

Condensed Corporate and Consolidated Balance Sheet — December 31, 1948

Assets and Other Debits	Niagara Hudson Power Corporation and Subsidiary Companies	Niagara Hudson Power Corporation
Electric and Gas Fixed Capital	$556,500,803	$ —
Capital Stock Expense	$ 321,602	$ —
Investment and Fund Accounts:		
Real estate, etc.	$ 16,182,052	$ —
Investment in subsidiary companies—consolidated	—	108,142,838
Other investments	918,010	590,246
Sinking funds	648,559	—
Special deposits for construction	7,700,000	—
	$ 25,448,621	$108,733,084
Current and Working Assets:		
Cash	$ 11,494,527	$ 1,746,674
Accounts receivable, less reserve	9,366,361	48
Materials and supplies	14,236,358	—
Other current and working assets	4,057,907	1,448
	$ 39,155,153	$ 1,748,170
Deferred Debits	$ 3,557,519	$ —
Total Assets and Other Debits	$624,983,698	$110,481,254
Liabilities and Other Credits		
Capital Stock—Niagara Hudson Power Corporation:		
First preferred—$100 par value	$ 37,887,500	$ 37,887,500
Second preferred, series A and B—$100 par value	10,593,000	10,593,000
Common—$1 par value	9,580,989	9,580,989
	$ 58,061,489	$ 58,061,489
Preferred Stocks of Subsidiary Companies	$ 79,000,000	$ —
Premium on Preferred Stocks of Subsidiary Companies	1,081,000	—
	$ 80,081,000	$ —
Long-Term Debt:		
Funded debt of subsidiary companies	$171,706,000	$ —
Notes payable by subsidiary companies	30,000,000	—
Notes payable by Niagara Hudson Power Corporation	17,000,000	17,000,000
Liability relating to Sacandaga and Stillwater Reservoirs	3,023,969	—
	$221,729,969	$ 17,000,000
Current and Accrued Liabilities:		
Accounts payable	$ 9,756,450	$ 48,542
Notes payable due within year	4,500,000	3,000,000
Dividends payable on preferred stocks	1,010,006	606,006
Accrued Federal taxes on income	11,667,218	528,044
—Less estimated amount refundable	(1,952,000)	—
Other current and accrued liabilities	4,693,536	142,286
	$ 29,675,210	$ 4,324,878
Deferred Credits	$ 3,572,623	$ —
Reserve for Depreciation of Fixed Capital	$171,212,674	$ —
Other Reserves	$ 3,598,106	$ 132,784
Surplus:		
Capital surplus	$ 21,249,841	$ 11,463,973
Earned surplus	35,802,786	19,498,130
	$ 57,052,627	$ 30,962,103
Total Liabilities and Other Credits	$624,983,698	$110,481,254

( ) Denotes red figure.

APPENDIX B

NIAGARA HUDSON POWER CORPORATION

Corporate Statement of Income for the Three Years Ended December 31, 1948, 1947 and 1946

	1948	1947	1946
Income:			
From Subsidiary Companies:			
Dividends on common stock	$11,169,013	$14,617,474	$11,500,617
Interest	—	—	6,137
Other	3,911	8,928	16,069
Total	$11,172,924	$14,626,402	$11,522,823
Deductions from Income:			
Expenses	$ 550,130	$ 441,700	$ 441,300
Provision for:			
Federal income taxes	563,000	600,000	385,000
Other taxes	62,851	40,216	51,162
Interest on notes payable to banks	493,246	575,514	739,861
	$ 1,669,227	$ 1,657,430	$ 1,617,323
Net Income	$ 9,503,697	$12,968,972	$ 9,905,500
Dividend requirements on preferred stocks	2,424,025	2,424,025	2,424,025
Balance applicable to common stock	$ 7,079,672	$10,544,947	$ 7,481,475

NIAGARA HUDSON POWER CORPORATION AND SUBSIDIARY COMPANIES

Condensed Consolidated Income Statements for the Years 1937-1948, Inclusive

(000 omitted)

	1948	1947	1946	1945	1944	1943	1942	1941	1940	1939	1938	1937
Operating Revenues	$138,161	$129,005	$117,675	$115,305	$115,303	$117,735	$110,823	$103,154	$91,492	$85,414	$82,371	$87,562
Operating Expenses	$ 77,048	$ 64,142	$ 51,578	$ 49,084	$ 50,267	$ 51,911	$ 46,234	$ 43,574	$38,036	$35,125	$32,412	$34,586
Depreciation	11,550	12,247	12,516	12,318	12,169	12,604	12,893	12,184	11,256	10,951	10,977	10,227
Taxes	27,866	28,850	27,389	26,167	25,783	29,283	28,968	21,134	17,314	15,330	14,992	14,360
Emergency Diversion Reserve Appropriation	(115)	(139)	(72)	(166)	843	1,580	639	542	—	—	—	—
Total	$116,349	$105,100	$ 91,411	$ 87,403	$ 89,062	$ 95,378	$ 88,734	$ 77,434	$66,606	$61,406	$58,381	$59,173
Operating Income	$ 21,812	$ 23,905	$ 26,264	$ 27,902	$ 26,241	$ 22,357	$ 22,089	$ 25,720	$24,886	$24,008	$23,990	$28,389
Other Income	(5)	(1)	318	571	677	829	760	758	828	775	824	333
Gross Income	$ 21,807	$ 23,904	$ 26,582	$ 28,473	$ 26,918	$ 23,186	$ 22,849	$ 26,478	$25,714	$24,783	$24,814	$28,722
Charges in Lieu of Federal Taxes on Income	—	129	1,054	5,726	3,307	—	—	—	—	—	—	—
Gross Income (after above charges)	$ 21,807	$ 23,775	$ 25,528	$ 22,747	$ 23,611	$ 23,186	$ 22,849	$ 26,478	$25,714	$24,783	$24,814	$28,722
Interest on Long-term Debt	$ 5,980	$ 5,874	$ 6,279	$ 7,296	$ 8,779	$ 9,192	$ 9,392	$ 9,680	$ 9,538	$ 9,449	$ 9,653	$ 9,782
Dividends on Preferred Stocks of Subsidiary Companies	2,876	2,876	3,032	6,708	7,357	7,357	7,356	7,357	7,357	7,357	7,357	7,905
Miscellaneous Deductions	(508)	165	145	597	625	558	370	329	100	653	609	885
Income Deductions (exclusive of charges in lieu of taxes)	$ 8,348	$ 8,915	$ 9,456	$ 14,601	$ 16,755	$ 17,107	$ 17,118	$ 17,366	$16,995	$17,459	$17,619	$18,572
Net Income	$ 13,459	$ 14,860	$ 16,072	$ 8,146	$ 6,856	$ 6,079	$ 5,731	$ 9,112	$ 8,719	$ 7,324	$ 7,195	$10,150
Dividend Requirements on Preferred Stocks of Niagara Hudson	2,424	2,424	2,424	2,424	2,424	2,424	2,424	2,424	2,424	2,424	2,424	2,222
Balance for Common Stock	$ 11,035	$ 12,436	$ 13,648	$ 5,722	$ 4,432	$ 3,655	$ 3,307	$ 6,688	$ 6,295	$ 4,900	$ 4,771	$ 7,928
Per Share of Common:												
Earnings	$1.15	$1.30	$1.42	$ .60	$ .46	$ .38	$ .35	$ .70	$ .66	$ .51	$ .50	$ .83
Dividends Paid	—	—	—	—	—	—	—	—	.15	—	.25	.40

( ) Denotes red figure.

APPENDIX D

PRO FORMA CONSOLIDATING BALANCE SHEET GIVING EFFECT TO THE CONSOLIDATION OF CENTRAL NEW YORK POWER CORPORATION, BUFFALO NIAGARA ELECTRIC CORPORATION AND SUBSIDIARY COMPANIES, AND NEW YORK POWER AND LIGHT CORPORATION

As of December 31, 1948

Assets and Other Debits	Central New York Power Corporation	Buffalo Niagara Electric Corporation and Subsidiary Companies	New York Power and Light Corporation	Inter-Company Eliminations and Adjustments	The New Operating Company and Subsidiary Companies
Utility Plant	$164,178,528	$241,991,363	$142,188,207	($ 45,127)	$548,312,971
Capital Stock Expense	$ 133,864	$ 113,196	$ 74,542	($ 299,543)	$ 22,059
Investment and Fund Accounts:					
Real estate, etc.	$ 2,967,798	$ 2,500,129	$ 3,802,974	$ —	$ 9,270,901
Special deposits for construction	2,600,000	5,100,000	—	—	7,700,000
Other investments and sinking funds	468,427	471,696	35,337	—	975,460
	$ 6,036,225	$ 8,071,825	$ 3,838,311	$ —	$ 17,946,361
Current and Working Assets:					
Cash	$ 2,888,222	$ 5,517,596	$ 958,681	$ —	$ 9,364,499
Accounts receivable, less reserve	2,972,676	4,343,396	2,525,992	(485,965)	9,356,099
Materials and supplies	6,291,888	4,855,739	3,055,743	—	14,203,370
Other current and working assets	229,168	1,627,080	1,939,756	—	3,796,004
	$ 12,381,954	$ 16,343,811	$ 8,480,172	($ 485,965)	$ 36,719,972
Deferred Debits	$ 1,239,157	$ 2,145,307	$ 158,718	—	$ 3,543,182
Total Assets and Other Debits	$183,969,728	$268,665,502	$154,739,950	($ 830,635)	$606,544,545
Liabilities and Other Credits					
Capital Stock:					
Preferred Stock	$ 20,000,000	$ 35,000,000	$ 24,000,000	$ —	$ 79,000,000
Common stock	25,244,049	22,000,000	13,137,107	(60,381,156)	—
Class A and common stock (See Note)	—	—	—	(60,381,156 135,428,734	95,809,890
	$ 45,244,049	$ 57,000,000	$ 37,137,107	$35,428,734	$174,809,890
Premium on Preferred Stocks	$ 30,000	$ 497,000	$ 554,000	$ —	$ 1,081,000
Long-Term Debt:					
Funded debt	$ 50,872,000	$ 72,049,000	$ 48,785,000	$ —	$171,706,000
Notes payable	15,000,000	15,000,000	—	—	30,000,000
Liability relating to reservoirs	388,574	—	2,038,733	—	2,427,307
	$ 66,260,574	$ 87,049,000	$ 50,823,733	$	$204,133,307
Current and Accrued Liabilities:					
Accounts payable	$ 2,444,720	$ 4,359,427	$ 3,327,119	($ 485,965)	$ 9,645,301
Notes payable due within year	—	—	1,500,000	—	1,500,000
Accrued Federal taxes on income	5,405,089	2,449,746	3,232,780	—	11,087,615
—Less estimated amount refundable	(546,000)	(1,353,000)	(53,000)	—	(1,952,000)
Other current and accrued liabilities	1,080,126	2,358,778	1,412,516	—	4,851,420
	$ 8,383,935	$ 7,814,951	$ 9,419,415	($ 485,965)	$ 25,132,336
Deferred Credits	$ 1,640,885	$ 840,331	$ 1,081,867	$ —	$ 3,563,083
Reserve for Depreciation of Utility Plant	$ 47,386,578	$ 75,999,783	$ 46,467,878	$ —	$169,854,239
Other Reserves	$ —	$ 3,434,809	$ —	$ —	$ 3,434,809
Surplus:					
Capital surplus—special	$ 4,088,305	$ 8,155,282	$ 4,192,778	($16,436,365)	$ —
Capital surplus	3,530,334	24,522,092	—	(13,166,641)	14,885,785
Earned surplus	7,405,068	3,352,254	5,063,172	(344,670) (5,825,728)	9,650,096
	$ 15,023,707	$ 36,029,628	$ 9,255,950	($35,773,404)	$ 24,535,881
Total Liabilities and Other Credits	$183,969,728	$268,665,502	$154,739,950	($ 830,635)	$606,544,545

( ) Denotes red figure.

Note: This consolidating balance sheet is derived from statements submitted by Niagara Hudson which show no allocation of capital between the Class A and common stock of the New Operating Company. As indicated in the text, we do not consider that this would be consistent with good accounting practice, which would require that the capital represented by each class of stock should be allocated on an appropriate basis and separately shown.

APPENDIX E

PRO FORMA CONSOLIDATING STATEMENT OF INCOME OF CENTRAL NEW YORK POWER CORPORATION, BUFFALO NIAGARA ELECTRIC CORPORATION AND SUBSIDIARY COMPANIES, AND NEW YORK POWER AND LIGHT CORPORATION

For the Year Ended December 31, 1948

	Central New York Power Corporation (Including Northern Development Corporation)	Buffalo Niagara Electric Corporation and Subsidiary Companies	New York Power and Light Corporation	Inter-Company Eliminations	The New Operating Company and Subsidiary Companies
Operating Revenues:					
Electric	$32,937,286	$58,518,109	$30,602,605	$ 17,048 (956,666)	$121,118,382
Gas	9,759,100	—	6,678,563	(188,495)	16,249,168
Total Operating Revenues	$42,696,386	$58,518,109	$37,281,168	($1,128,113)	$137,367,550
Operating Revenue Deductions:					
Operation	$18,571,944	$29,646,954	$17,908,052	$ 107 (1,145,161)	$ 64,981,896
Maintenance	3,969,155	4,245,991	2,946,889	—	11,162,045
Depreciation	3,389,306	3,026,100	3,058,792	10,474	11,484,672
Provision for:					
Federal income taxes	3,237,000	2,079,000	2,280,000	—	7,596,000
Canadian income taxes	—	505,788	—	—	505,788
New York State water charge	—	1,886,180	—	—	1,886,180
Other taxes	4,860,115	7,686,530	4,536,135	6,467	17,089,247
Emergency diversion reserve appropriation	—	(115,089)	—	—	(115,089)
Total Operating Revenue Deductions	$34,027,520	$50,961,454	$30,729,868	($1,128,113)	$114,590,729
Operating Income	$ 8,668,866	$ 7,556,655	$ 6,551,300	$ —	$ 22,776,821
Other Income	(14,285)	36,973	(35,809)	—	(13,121)
Gross Income	$ 8,654,581	$ 7,593,628	$ 6,515,491	$ —	$ 22,763,700
Income Deductions:					
Interest on long-term debt	$ 1,763,667	$ 2,258,219	$ 1,437,105	$ —	$ 5,458,991
Other interest charges	66,179	14,042	54,220	—	134,441
Interest charged to construction	(275,104)	(384,345)	(69,430)	—	(728,879)
Amortization of debt discount and expense	5,904	—	—	—	5,904
Amortization of premium on debt	(31,781)	(24,349)	(23,709)	—	(79,839)
Miscellaneous	21,493	109,536	27,235	—	158,264
Total Income Deductions	$ 1,550,358	$ 1,973,103	$ 1,425,421	$ —	$ 4,948,882
Net Income	$ 7,104,223	$ 5,620,525	$ 5,090,070	$ —	$ 17,814,818
Dividend Requirements on Preferred Stock	680,000	1,260,000	936,020	—	2,876,020
Balance	$ 6,424,223	$ 4,360,525	$ 4,154,050	$ —	$ 14,938,798

( ) Denotes red figure.

NIAGARA HUDSON POWER CORPORATION

Price Ranges of Stocks and Option Warrants

	First Preferred Stock, 5% Series			Second Preferred Stock, 5% Series A and B			Common Stock		Class B Option Warrants	
	Price Range		Dividend Arrears as of 4th Quarterly Dividend Date	Price Range		Dividend Arrears as of 4th Quarterly Dividend Date	Price Range		Price Range	
	High	Low		High	Low		High	Low	High	Low
1929	—	—	—	—	—	—	(a) 92¼	33¾	(a) 70½	6
1930	—	—	—	—	—	—	(a) 72⅜	24¾	(a) 47⅝	12⅜
1931	—	—	—	—	—	—	(a) 46½	16½	(a) 25½	6
1932	—	—	—	—	—	—	(a) 21¾	7⅞	(a) 9⅜	1⅜
1933	—	—	—	—	—	—	16⅜	4½	5	⅝
1934	—	—	—	—	—	—	9¾	3	2¾	½
1935	—	—	—	—	—	—	10⅝	2½	2	½
1936	—	—	—	—	—	—	17¾	7¾	3¼	1
1937	100	69¼	None	(b) 94	63	None	18¼	4	2¾	⅞
1938	89½	70	None	82¾	60	None	10⅜	5⅛	2¼	⅞
1939	91½	77¼	None	82	65½	None	9¼	5⅜	2	¾
1940	92	73	None	87	60¼	None	6¼	2¾	1	⅛
1941	79¾	50	None	65½	45⅛	None	3½	1	5/16	1/32
1942	69½	37	$ 1.25	53	21⅞	$ 1.25	1⅞	⅞	¼	1/32
1943	83¾	54	6.25	76½	42	6.25	3¾	1¾	11/16	1/16
1944	93¾	74½	11.25	83½	65	11.25	3⅞	2¼	5/16	⅛
1945	119	89½	16.25	114	82	16.25	9½	3¼	2¼	5/16
1946	123½	112½	16.25	120	100	21.25	15	8⅛	3⅜	⅞
1947	124	96	3.75	122½	110	26.25	10⅜	7⅜	1¼	11/16
1948	105	92	None	117	92	None	10¼	6½	1	⅛
1949(c)	100½	94½	None	96¾	92⅝	None	12⅛	7½	¼	⅛

(a) Adjusted for 1 for 3 exchange of shares and warrants made in 1932.

(b) Excludes data for Second Preferred Stock, Series B from February 1, 1937, to May 3, 1937. The price range of such stock was reported as 115-98 during such period.

(c) Through July.

COMMISSIONER MCENTIRE, dissenting:

I regret that I cannot accept the conclusion of the majority opinion that the issuance of the Class A convertible preference stock in this case meets the standards of Section 7 or that the Dissolution Plan[1] is "necessary" to effectuate the provisions of Section 11 (b) (2). Because of the importance of the fundamental issues which are involved, I feel justified in indicating briefly why I do not agree with the majority's reasoning and conclusions.

In approving the plan, the majority treats this case as an exception to heretofore well-established principles. I am unable to see in the situation before us valid grounds for carving out the exception which the majority makes. It is clear, however, that we are here dealing with the question of whether or not grounds exist for an exception and not with a challenge to general principles applicable in ordinary cases.

The majority opinion finds, and I agree, that the Niagara Hudson bank debt and preferred stock constitute an undue complexity in the structure of the Niagara Hudson system, that the Niagara Hudson system contains a "great-grandfather" situation, that the security structure of Niagara Hudson presents some question as to inequitable distribution of voting power in the system, and that Section 11 (b) (2) requires the elimination of Niagara Hudson's bank loans and preferred stock. My objection to the plan is its failure to do the basic job. Far from providing an "appropriate means for achieving results required by Section 11 (b)," it would perpetuate in different form the essential complexities which the majority opinion deplores. Consummation of the plan will not really eliminate either the debt or the preferred stock of Niagara Hudson, or increase appreciably the equity in the system represented by the common stock. The debt will continue to be whittled away out of earnings, as now[2]; the preferred stock will remain in the position of a junior preferred stock of the system, coming out of the corporate structure of Niagara Hudson itself but reappearing in the structure of the New Operating Company.

I cannot help being somewhat disturbed by the cloak of respectability which the majority opinion seems to throw about the argument of the preferred stockholders that they are entitled to remain in the enterprise undisturbed in the preference they presently hold. It seems to me quite clear that the major task which has confronted the Commission in its whole experience with Section 11 has been that of transmuting the interests of preferred stockholders of utility holding companies into other forms—of equal value, but definitely without the preference position which has so frequently led to grief. The vested rights of holding company preferred stocks must be recognized and compensated in any plan, but need not, and indeed must not, be preserved and maintained "without a clear demonstration of reasonable necessity."[3]

The preservation and maintenance of their preferred position has been a paramount objective of the senior security holders of many utility holding companies. Similarly, common stockholders have argued repeatedly that preferred stock preferences should be retained so that the junior security holders will retain their leverage position. It is not surprising then that the Dissolution Plan is approved in principle by most of the vocal preferred and common stockholders of Niagara Hudson. Their accord is obviously based upon the utility of the plan as a device to avoid the objective to which the Act commits this Commission, namely, the genuine elimination of Niagara Hudson's preferred stocks as an unnecessary complexity in the structure of the system.

Enforcement of the statutory objective has generally been accepted by the utility holding company industry, and in those cases where litigation has been required the courts as well as the Com-

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[1] While the plan for the exchange of Class A stock for the Niagara Hudson preferred has been described and referred to by the participants as the "Dissolution Plan," it must be remembered that the plan merely provides that within two years, unless we extend the time, Niagara Hudson will pay its bank loans and dispose of its remaining assets, and will then dissolve. Hence, while using the nomenclature "Dissolution Plan," I consider it important not to lose sight of its limitations.

[2] To the extent that common stockholders of Niagara Hudson exercise their options to take down common stock of the new operating company, the debt will be reduced, but the earnings of Niagara Hudson available to pay the remaining debt will also be reduced *pro tanto*.

[3] *The Commonwealth & Southern Corporation*, 9 S.E.C. 609, 615 (1941). The majority opinion does not meet squarely this issue posed by the Division as to the failure of the Dissolution Plan to effect a genuine elimination of the system complexities. Furthermore, it admits that the issuance of the Class A stock would introduce "an additional class of security in the corporate structure of the New Operating Company" (an oblique phrase for "complexity"), which this Commission "could not generally approve" under the standards of Section 7 (d) of the Act.

mission have consistently upheld the statutory policy.[4] A method of compliance that will avoid litigation is, of course, desirable, but the threat of litigation affords no justification for our failure to require compliance with Section 11 (b) (2). The one valid function of agreement among different classes of security holders is to resolve issues of fairness, subject to our independent scrutiny. In this case no agreement has been reached on the fairness issues, which were vigorously litigated throughout this proceeding.

The majority opinion's discussion of voting power points up the failure of the Dissolution Plan to accomplish the results required by Section 11 (b)(2). The inequitable distribution of voting power referred to in the majority opinion results from the fact that the common stock of Niagara Hudson, with an equity of only 16% of the consolidated capitalization and surplus, has 95% of the voting rights of the system. The security structure of the New Operating Company upon consummation of the Consolidation Plan, with a common stock equity amounting to 29.6% of consolidated capitalization and surplus, would present no voting power problem. But the Dissolution Plan will perpetuate the inadequate equity of the Niagara Hudson common stock at the operating company level, by causing the New Operating Company to issue Class A stock without acquiring any substantial assets in exchange, and so reduce the equity of the remaining common stock to less than 18% of consolidated capitalization and surplus. The concurrent proposal to reduce the normal voting power of the common stock to 80% is no cure; the fair and equitable distribution of voting power contemplated by Section 11 (b)(2), as we have heretofore held, involves embodiment of all the normal voting power in a common stock which represents a sufficient equity in assets and earnings to justify it, "with every share participating equally in the fate of the enterprise and in the control of its management."[5] The plan, by preserving the preferential rights of Niagara Hudson's preferred stockholders, perpetuates the inequitable distribution of voting power as well as the existing complexities of structure.

The majority opinion states that it affirms "our prior decisions that in the absence of strong countervailing factors, the standards of Section 7 (d) of the Act would militate against the issuance of a dividend preference convertible stock." What are the "strong countervailing factors" that make this case the exception? Going to the heart of the majority opinion, it is but one: an asserted "hardship" to the preferred or common stockholders, were a common stock allocation plan, or a plan involving a sale of common stock through rights offerings or otherwise, to be employed here. Such plans of other holding companies have been submitted, approved, and consummated on innumerable occasions as vehicles for compliance with Section 11 (b).

The alleged "hardship" to preferred stockholders of an allocation plan for this company is found in the contention that under such a plan the shares of new common stock to be issued in exchange for the Niagara Hudson preferred would not have an *initial market price* within a reasonable range of the recent market price of the preferred stock. There is no contention that such an exchange would not be "fair and equitable" to the preferred; on the contrary, it is expressly assumed by the majority that the 4.4 shares of common stock into which the 4 shares of Class A are convertible would constitute the equitable equivalent of the rights surrendered by the Niagara Hudson first preferred shareholders.

There is testimony in the record that under then existing market conditions, the initial market price of the Class A stock would be about 25, and of the common stock around 20. The seasoned market prices of these two securities, on the other hand, were estimated at approximately 26⅞ and 22-23, respectively. Thus under the plan the first preferred, which was then selling at between 98 and 100, would receive Class A stock with an immediate market value of approximately 100 and a seasoned price of about 107½, as estimated by those witnesses, whereas under a common stock plan

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[4] See the *Commonwealth & Southern Corporation*, 11 S.E.C. 138 (1942), aff'd. *Commonwealth & Southern Corporation* v. *S.E.C.*, 134 F. 2d 747 (C.A. 3, 1943); *The Middle West Corporation*, 11 S.E.C. 533, aff'd, *Central & Southwest Utilities Co.* v. *S.E.C.*, 136 F. 2d 273 (C.A.D.C. 1943); *Community Gas and Power Company*, —— S.E.C. —— (1946), Holding Company Act Release No. 6346, —— S.E.C. —— (1947), Holding Company Act Release No. 7131, approved and enforced 71 F. Supp. 171 (D. Del., 1947), aff'd. 168 F. 2d 740 (C.A. 3, 1948), *cert. den.* 334 U.S. 846.

[5] *The Commonwealth & Southern Corporation, supra*, note 4, 11 S.E.C. at 165. In earlier proceedings under Section 11 involving this very system, the Commission specifically rejected the contention of certain holders of second preferred stock in the system that a fair and equitable distribution of voting power could be achieved "by granting voting rights to" the second preferred stock "while retaining its preferential rights to earnings." *Niagara Hudson Power Corporation*, —— S.E.C. —— (1944), Holding Company Act Release No. 5115 at p. 30.

(assuming an allocation of 4.4 shares of common instead of 4 shares of Class A) it would receive securities with an immediate market value of about 88 and a seasoned price according to the same estimates of $96.80 to $101.20.[6] It is clear that any challenge to the fairness of such an allocation of common stock to the preferred on that basis, again assuming the equitable equivalence found by the majority, could not prevail[7]; I cannot concur in the view that the alleged discrepancy between the initial market price of the new common stock and the present market price of the Niagara Hudson preferred constitutes a sufficient basis for approving a plan which fails to eliminate acknowledged basic structural complexities.[8]

The alleged "hardship" to preferred stockholders would, of course, disappear under a plan to pay them in cash the equitable equivalent of their present holdings, and the preferred stockholders could be permitted to remain in the enterprise by giving them as an alternative the right to receive common stock.[9] But here a new and equally spurious plea of hardship to the common stockholders is suggested as a justification for continuing the present complexity. Sale of enough shares to pay the preferred in cash, it is claimed, would, because of the unseasoned character of the securities to be sold, involve the possibility of sacrifice of values by the common stockholders. Any such claim must ignore our extensive experience with such programs in our administration of the Holding Company Act.

Every time a holding company sells all or part of its interest in a wholly-owned subsidiary, it is selling an "unseasoned" stock. Company after company, however, has found it possible to do the job without any sacrifice of the interests of its investors. It might be appropriate to sell the stock in two or more steps, and to protect common stockholders against temporary market fluctuations by the issuance of rights. It might be appropriate to satisfy the preferred stock claims by a combination of new common stock and cash, so as to minimize the aggregate amount of cash to be raised. That there are numerous feasible methods of accomplishing the required result without sacrifice of values is attested to not only by the numerous companies which have done it successfully, but by the management of Niagara Hudson itself in the representations made repeatedly to this Commission from 1945 through October 1948.

The alleged hardship to Niagara Hudson stockholders, if the company were compelled to adopt one or more of the tested means of eliminating the complexities in its structure, seems to me a wholly inadequate justification for perpetuating the complexity by the issuance of a security of the type here proposed. This becomes particularly clear when the nature of a convertible preference stock is considered in the light of the standards for the issuance of securities provided by Congress in Section 7 of the Act.

Section 7 implements the simplification requirements of Section 11 (b) (2) by formulating substantive standards for our guidance in considering the issuance of securities. In the first place, Section 7 (c) (1) prohibits the Commission from approving the issuance of any security unless it is "(A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant," (B) a bond, or (C) a guaranty. Certain exceptions to this prohibition listed in Section 7 (c) (2) deal with cases where new securities are to be issued solely for purposes of refunding or reorganization, financing the business of the issuer as a utility or an operating non-utility company, or necessary and urgent corporate purposes of the issuer where the requirements of Section 7(c) (1) would impose an unreasonable

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[6]Substitution of common stock for Class A stock might result in a higher market value per share of common stock, although company witnesses thought otherwise.

[7]In determining the fairness of Section 11 (e) plans, discrepancies between market prices of the securities to be issued and to be given up are not significant. *Cf. Washington Railway & Electric Company*, —— S.E.C. —— (1947), Holding Company Act Release No. 7410 at mimeographed page 27; *Northern States Power Company*, —— S.E.C. —— (1948), Holding Company Act Release No. 7976, approved and enforced *In re Northern States Power Company*, 80 F. Supp. 193 (D. Minn. 1948); *The North American Company*, —— S.E.C. —— (1947), Holding Company Act Release No. 7514, approved and enforced *In re Illinois Power Company*, 74 F. Supp. 317 (D. Del., 1947), affirmed *sub. nom. In re North American Light & Power Co.*, 170 F. 2d 924 (C.A. 3, 1948).

[8]Whenever a holding company is to be or is being reorganized, and particularly when a plan is pending, the market value of its outstanding securities is based upon current judgments as to their reorganization equivalent, and not merely upon their own investment quality. This being so, any reliance upon recent market values of the Niagara Hudson preferred is a substitution of circular reasoning for objective analysis.

[9]This is not a case like *Public Service Company of New Jersey*, —— S.E.C. —— (1948), Holding Company Act Release No. 8002, where the preferred stockholders, owning a non-callable security, had a right absent the Act to retain indefinitely their preferred position in the enterprise.

financial burden upon it. In addition, any security must meet the tests of Section 7 (d), which is not subject to the same exception, i.e., is it "reasonably adapted to the security structure" of the issuer, and is "financing by the issue and sale of the particular security" "necessary or appropriate to the economical and efficient operation of a business in which the applicant is engaged or has an interest." Since the securities to be issued under a Section 11 (e) plan should conform to the standards of Section 7,[10] we must consider these issues in determining the "necessity" of the plan. It is my view that the Class A stock proposed to be issued in this case clearly does not meet those standards.

The Federal Trade Commission Report of the investigation of the public utility industry,[11] upon which the Act was largely based,[12] made reference to the prevalent use of convertible securities among utilities, pointed out their attendant evils, and recommended legislation which would have limited stocks to just two kinds—common and preferred. The Act itself, although giving some discretion to the Commission to deal with unusual situations, generally sought to limit security issues to par value, no-preference common stock and bonds.

The evils of a convertible preference security are well known. Our language in *Public Service Company of Indiana, Inc.*,[13] dealing with convertible debentures, is equally apposite here. We there pointed out that such a security "combines the investment features of a debenture with the speculative aspects of a long term option warrant to obtain stock at a fixed price. So long as the market value of the stock is close to the conversion price, the price of the debentures will be determined by the investment value of the debentures *qua* debentures plus whatever value is attributed to the option to purchase stock at that price in the future. If, however, the market price of the stock rises above the conversion price, the price of the debenture will fluctuate with the value of the stock. Should the price of the stock become very high and raise the price of the debenture proportionately, the latter will lose all of the stability normally associated with a debenture and because of the low yield the holder will be interested in retaining it only as a convenient means of speculating in the stock into which the debenture is convertible."

There are extremely potent reasons for the strong disfavor with which the Act and the precedents of this Commission view a convertible security of this type. The objections to it are ones of substance and not merely of form.

Basically a utility enterpise such as the New Operating Company, with more than 70% of its capitalization in conventional debt and preferred stock, is the same physical and economic creature—with the same potentialities for creating earnings—whether or not it has outstanding a convertible security. If we are to take seriously the lessons of experience and the injunctions of the statute, in the long run no legitimate value can be added to the enterprise by the further division of the common stock equity into a convertible second preferred layer and a thinner common stock equity. The same generating capacity, the same lines and poles and substations and meters will serve the same demands of the same customers. And presumably the same rate regulatory process will allow the enterprise to earn the identical return to its stockholders. The issuance of a convertible security does make very profound changes in the company's relationship to its investors. A hybrid security that is neither fish, flesh, nor fowl has been introduced into the capital structure. Any difference in value between it and the common stock which it might command on conversion either is wholly illusory, or reflects an equivalent detriment to the common stockholders.

Thus, the proposed Class A stock will add nothing to the real value of the enterprise to be conducted by the New Operating Company. Normally the market would reflect the fact that any value which has been added to the Class A stock has been subtracted from the remaining common stock; any failure to do so would indicate the kind of deception of investors in either the Class A stock or the common stock which Sections 7 and 11 of the Holding Company Act were intended to avoid—Section

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[10] *The Commonwealth & Southern Corporation*, 11 S.E.C. 138, 158, affirmed *sub nom. Commonwealth & Southern Corporation* v. *S.E.C.*, 134 F. 2d 747 (C.A. 3, 1943); *Public Service Commission of New York* v. *S.E.C.*, 166 F. 2d 784 (C.A. 2, 1948), *cert. den.* 334 U.S. 838.

[11] Federal Trade Commission, Utility Corporations, Part 72-A, pp. 360-361, 388, 402-405, 864, Part 73-A, pp. 61-62, 71-72.

[12] See Section 1 (b) of the Act.

[13] —— S.E.C. —— (1947), Holding Company Act Release No. 7554.

11 by requiring the simplification of corporate structures,[14] and Section 7 by setting out standards for the issuance of new securities under the Act. The testimony of company witnesses that 4 shares of Class A stock would have a higher market value than the 4.4 shares of common stock into which they are convertible, but that the common stock would have substantially the same market price either way, is in effect testimony to the deceptive effect on investors of this kind of security.[15]

If this were all that is wrong with the convertible preference stock device it would be questionable enough, but probably it would not require the degree of disfavor which has been accorded it. Unfortunately the detriment to investors and to the financial integrity of the company does not stop there. The cost of indulging in this sort of device is much more expensive and far-reaching.

So long as a convertible preference security is outstanding, it affords a continuing threat of dilution of the outstanding common. The extent of that dilution is solely dependent upon the degree of conversions which, in turn, is largely dependent upon the amount by which the common's earnings exceed the preference dividend. The presence of a convertible security in the capital structure may be a bar, and in any event is a deterrent, to the sale of more common stock no matter how desirable or necessary such sale might be. And, even if additional common stock is sold, the price received for it must necessarily suffer from the existence of both the overhanging call of the convertible preference stock and its prior claim on earnings. Exercise of the conversion privilege is least likely at times when needed common stock equity is most difficult to sell for cash; at such times the holders of the preference stock would desire to retain their preferred position. Conversions are most likely at times when the company could sell common stock for cash on a more favorable basis.

Parenthetically I might mention that the experience which we have had with this type of security—in the *Philadelphia Electric*[16] and *Public Service* cases—has not been such as to dispel what might be characterized as these *a priori* objections to a convertible preference stock. Thus Philadelphia Electric Company still has about one-third of the original amount of its convertible preference stock outstanding, despite the concurrence of unprecedentedly high market prices and elimination of excess profits taxes with the original stepdown of the conversion rate in June 1946. Public Service has similarly found that conversions, which company witnesses and the Commission anticipated to follow promptly upon consummation of the plan, failed to materialize.

While concededly the extent of these factors is minimized if the conversion period is of shorter duration and the percentage of possible dilution kept small, they are nevertheless sufficiently serious to militate against the issuance of a convertible preference stock absent exceptional circumstances. But, when we seek the exceptional circumstances which would justify such a security in this case, we seek in vain. In each of the two other Section 11 (e) plans in which we approved the issuance of similar securities, there were such circumstances. I was not a member of this Commission when the *Philadelphia Electric* case was decided, and because of illness I was unable to participate in *Public Service Company of New Jersey*. Although I personally disagree with some features of those decisions, I note that, if their correctness be assumed *arguendo*, they are distinguishable from the instant case. In the *Philadelphia Electric* case, which arose early in the administration of the Act, the plan accomplished a major step in both the integration and simplification of a holding company system through the divestment of more than half of its assets and the genuine elimination of 40% of its preferred stock.[17] In the *Public Service* case the new securities issued under the plan replaced large issues of non-callable holding company preferred stocks and considerable amounts of non-callable holding company debt. No comparable problems are presented by the Niagara Hudson system which would, in my opinion, justify a departure from the standards of Section 7.

Since, for the foregoing reasons, I would disapprove the plan because of its failure to meet the "necessity" standard, I do not get to a consideration of the issues under the "fairness" standard of the Act.

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[14] As the Commission has previously held in earlier proceedings involving this system, as well as in other cases, difficulty of investor appraisal is itself a serious aspect of undue complexity within the meaning of Section 11 (b) (2). *Niagara Hudson Power Corporation, et al.*, Holding Company Act Release No. 5115, at p. 26 (1944); see also *Electric Bond and Share Co., et al.*, 9 S.E.C. 978, 993 (1941); 11 S.E.C. 1146, 1209 (1942).

[15] See Graham and Dodd, *Security Analysis* (2d Ed. 1940) pp. 644-645.

[16] *The United Gas Improvement Company*, 12 S.E.C. 1080 (1943).

[17] Only 60% of the U.G.I. preferred stock was replaced with the dividend preference stock of Philadelphia Electric.

[fol. 16]

EXHIBIT E

EXHIBIT E
97

As filed with the Securities and Exchange Commission, August 24, 1949.

SECOND AMENDED PLAN

of

NIAGARA HUDSON POWER CORPORATION

Pursuant to Section 11(e)

of the

Public Utility Holding Company Act of 1935

To Cease To Be a Holding Company and To Dissolve

Introductory Statement

The Board of Directors of Niagara Hudson Power Corporation (Niagara Hudson) has approved the following Second Amended Plan (the Plan) and has directed its filing with the Securities and Exchange Commission pursuant to the provisions of Section 11(e) of the Public Utility Holding Company Act of 1935 (the Act) for an order approving it.

This Plan is submitted in accordance with the Findings and Opinion of the Securities and Exchange Commission dated August 16, 1949 (File Nos. 54-170 and 54-172).

Niagara Hudson is a corporation organized under the laws of New York and is a registered holding company under the Act. At August 1, 1949 its outstanding debt and securities were as follows:

Notes payable to Banks (due 1949-1950)	$16,000,000*
First preferred stock, 5% Series—$100 par value, 378,875 shares	37,887,500
Second preferred stock, 5% Series A—$100 par value, 90,281 shares	9,028,100
Second preferred stock, 5% Series B—$100 par value, 15,649 shares	1,564,900
Common stock, $1 par value—9,580,988½ shares	9,580,988.50

* $1,500,000 of this total is due and payable November 1, 1949 and the same amount six months thereafter with the remainder due November 1, 1950. After the consolidation referred to below is consummated, Niagara Hudson is required to pay $2,500,000 on its notes each May 1 and November 1 prior to November 1, 1950 when the balance becomes due. Niagara Hudson presently anticipates reducing its note indebtedness to banks to $12,000,000 on or before December 31, 1949.

In addition, Class B stock option warrants are outstanding entitling the holders thereof to purchase 497,191 3/6 shares of common stock at $50 for 1 1/6 shares at any time without limit.

The preferred stocks are redeemable at $107.50 per share plus accrued and unpaid dividends to date of redemption and are entitled to $100 per share plus accrued and unpaid dividends to date of dissolution in the event of voluntary or involuntary liquidation.

Niagara Hudson and Subsidiaries — Proceedings Preliminary to the Plan

Niagara Hudson is a holding company. Almost all of its income is derived from dividends on the common stocks of its subsidiaries.

Niagara Hudson owns all of the Common Stock of Buffalo Niagara Electric Corporation, Central New York Power Corporation and New York Power and Light Corporation, which render electric service to the public in an area in New York State having a total population of approximately 2,750,000, including such cities as Buffalo, Niagara Falls, Syracuse, Utica, Schenec-

tady, Albany and Troy, and which render gas service to the public in an area having a population of approximately 1,100,000.

Pursuant to a plan filed by Niagara Hudson on May 19, 1948, a single electric and gas operating company (New Operating Company) will be formed upon the consolidation of the three above-named Niagara Hudson subsidiaries prior to the effective date of this Plan. The New Operating Company will have issued and outstanding the same number of shares of common capital stock on formation as Niagara Hudson now has outstanding.

Union Bag & Paper Power Corporation, 100% owned by Niagara Hudson, owns both developed and undeveloped hydro-electric properties. Old Forge Electric Corporation, also 100% owned by Niagara Hudson, is an electric distributing company operating in Herkimer and Hamilton Counties, New York. Proceedings are pending before the Securities and Exchange Commission for consents necessary to merge Union Bag & Paper Power Corporation into New York Power and Light Corporation, and Old Forge Electric Corporation into Central New York Power Corporation. If these mergers are not consummated prior to the effective date of the consolidation to form the New Operating Company, that company will progress such mergers to completion.

Niagara Hudson also has the following direct and indirect subsidiaries:

Name	Nature of Business	
The Oswego Canal Company	Maintains and operates a hydraulic canal on the east bank of the Oswego River, New York, and leases rights as to the water diverted therefrom.	100% Subsidiaries of Niagara Hudson
Frontier Corporation	Owns undeveloped land comprising islands and lands riparian to the St. Lawrence River in St. Lawrence County, New York.	
St. Lawrence Power Company, Limited	Electric company operating in Ontario, Canada.	
The Niagara Falls Power Company	Electric utility generating and selling energy to certain large industrial customers in Niagara Falls, New York and to Buffalo Niagara Electric Corporation.	100% Subsidiary of Buffalo Niagara Electric Corporation
Canadian Niagara Power Company, Limited	Electric company operating in Ontario, Canada.	100% Subsidiary of The Niagara Falls Power Company

Niagara Hudson owns certain miscellaneous investments which at August 1, 1949 were carried, less reserves, at $454,382.06.

Prior to the effective date of the Plan, Niagara Hudson will cause all of its investments except common stock of the New Operating Company to be transferred to the New Operating Company.

Completion of the above-described proceedings and transfers affecting Niagara Hudson's subsidiaries and its other investments will leave Niagara Hudson as direct owner of only the common stock of the New Operating Company and cash.

The Plan herein is expressly conditioned upon prior consummation of the consolidation of the three Niagara Hudson subsidiaries into the New Operating Company.

Purposes of the Plan

Niagara Hudson is a respondent in a proceeding instituted by the Securities and Exchange Commission on August 28, 1942 (File No. 59-52) to determine, among other things, what action, if any, is necessary or appropriate to effect compliance with the Act in respect to Niagara Hudson.

This Plan is a further step in compliance with the simplification requirements of Section 11 and is part of a program for the elimination of Niagara Hudson's control of its operating subsidiaries. This program involves (1) completion of the consolidation to form the New Operating Company, (2) reclassification of the common stock of the New Operating Company into Class A stock having a preference as to dividends of $1.20 per share, and common stock, (3) exchange of Class A stock of the New Operating Company for the First Preferred Stock of Niagara Hudson in the ratio of 4 shares of Class A stock for each share of First Preferred Stock of Niagara Hudson, (4) exchange of Class A stock of the New Operating Company for Second Preferred Stock of Niagara Hudson in the ratio of 3.9 shares of Class A stock for each share of Second Preferred Stock of Niagara Hudson, (5) exchange of common stock of the New Operating Company for common stock of Niagara Hudson on the basis of .78 shares of common stock of the New Operating Company for one share of Niagara Hudson common stock plus a ratable amount of cash per share of Niagara Hudson common stock equal to its outstanding bank loan at the effective date of the Plan or as reduced during the exchange period, and (6) the dissolution of Niagara Hudson.

THE PLAN

I. Effective Date of Plan

The Plan shall become effective as soon as practicable, the effective date of the Plan to be fixed by the Board of Directors of Niagara Hudson; provided, however, that such date shall not be more than ninety days after the date upon which an order of a United States District Court of competent jurisdiction to enforce and carry out the terms and provisions of the Plan shall become final and no longer subject to appeal. All rights of all parties under the Plan shall be fixed as of the effective date thereof.

II. Reclassification of Common Stock of New Operating Company

The charter of the New Operating Company will be amended to reclassify its outstanding common stock into 1,928,627 shares of Class A stock and 7,473,172 shares of common stock, each without par value.

Subject to the prior rights of the New Operating Company preferred stock, the shares of Class A stock will have preference as to, and be limited to, cumulative dividends of $1.20 per annum payable in quarterly installments, and no dividends shall be payable and no other distributions shall be made on the common stock unless all dividends on the Class A stock have been paid or set aside for the current, and all past, quarterly dividend periods.

Each share of the Class A stock will be convertible at the option of the holder into 1 1/10ths shares of common stock during the first three years following the effective date of the Plan and into one share of common stock during the succeeding three years after which six-year period the conversion privilege shall terminate.

The Class A stock will be redeemable at the option of the New Operating Company as a whole or in part at any time or from time to time at $26.875 per share plus accrued dividends to the redemption date.

Holders of the Class A stock will have no preemptive rights but in all other respects will have the same voting rights as holders of common stock; provided, however, that (1) the New Operat-

ing Company shall not voluntarily liquidate, dissolve or wind up or sell, convey, exchange or transfer all or substantially all its property without the consent of the holders of at least two-thirds of the outstanding shares of Class A stock, (2) the terms of the Class A stock shall not be amended, altered or changed without the consent of the holders of at least two-thirds of the outstanding shares of Class A stock, and (3) that until the termination of the conversion privilege as to the Class A stock, additional shares of the common stock of the New Operating Company will not be issued upon the exercise of preemptive rights at a price more than 10% below the current market price at the time of offering.

III. Exchange of Class A Stock of New Operating Company for Preferred Stock of Niagara Hudson

The shares of the preferred stocks of Niagara Hudson will be exchanged for shares of Class A stock of the New Operating Company in the ratio of 4 shares of Class A stock for each share of the First Preferred Stock of Niagara Hudson and in the ratio of 3.9 shares of Class A stock for each share of the Second Preferred Stock of Niagara Hudson. Dividends will cease to accrue on the preferred stocks of Niagara Hudson and will commence to accrue on the Class A stock of the New Operating Company on the effective date of the Plan.

IV. Exchange of Common Stock of New Operating Company for Common Stock of Niagara Hudson Plus Cash

Following the effective date of the Plan, Niagara Hudson will offer to exchange common stock of the New Operating Company for common stock of Niagara Hudson upon the basis of .78 shares of common stock of the New Operating Company for one share of Niagara Hudson common stock plus a ratable amount of cash per share of Niagara Hudson common stock necessary to pay off the bank loan of Niagara Hudson outstanding at the effective date of the Plan or as reduced during the exchange period. Such ratable cash amount is presently estimated as of August 1, 1949 at approximately $1.60 per share. Such exchange offer shall remain open for a period of six months from the effective date of the Plan.

Cash received in the exchanges will be applied to payment of the unpaid principal of Niagara Hudson's bank loan.

V. Directions for Effecting Exchanges

Niagara Hudson will transmit promptly after the effective date of the Plan to its preferred and common stockholders, instructions for the presentation and surrender of certificates for such stocks to obtain (1) Class A stock of the New Operating Company to which Niagara Hudson preferred stockholders shall become entitled, and (2) common stock of the New Operating Company to which Niagara Hudson common stockholders electing to accept the exchange offer shall become entitled.

Provision will be made whereby the shares of Class A stock of the New Operating Company to which holders of preferred stock of Niagara Hudson become entitled under the Plan shall be surrendered to the New Operating Company if unclaimed by such preferred stockholders at the expiration of ten years from the effective date of the Plan.

VI. Scrip for Fractional Interests in Class A or Common Stock of New Operating Company

Holders of Second Preferred Stock of Niagara Hudson, upon being entitled under the Plan to receive fractions of a share of Class A stock of the New Operating Company, will receive in lieu thereof transferable scrip, exchangeable free of charge for full shares of Class A stock of the New Operating Company, but only when presented in amounts aggregating one or more full shares, on or before June 30, 1952.

Holders of common stock of Niagara Hudson or of Class A stock of the New Operating Company, upon being entitled under the Plan to receive fractions of a share of common stock of the New Operating Company, will receive in lieu thereof transferable scrip, exchangeable free of charge for full shares of common stock of the New Operating Company, but only when presented in amounts aggregating one or more full shares within six years of the effective date of the Plan.

The scrip certificates will provide with respect to fractions of a share of Class A stock that as soon as practicable after June 30, 1952, and with respect to fractions of a share of common stock, that as soon as practicable after the expiration of six years from the effective date of the Plan, any shares represented by outstanding scrip certificates shall be sold and the proceeds thereof held without accountability for interest for account of the holders of the scrip certificates for a further period of two years, after which all unsurrendered scrip certificates shall become void. Scrip certificates shall be non-voting and non-dividend bearing and shall not entitle the holders thereof to any rights as stockholders of the New Operating Company.

VII. Dissolution of Niagara Hudson

Subject to approval by the Securities and Exchange Commission and upon adequate notice to common stockholders, Niagara Hudson will dispose of all its interest in the common stock of the New Operating Company not distributed pursuant to the exchange offer hereunder in an appropriate manner not more than two years after the effective date of the Plan, unless such period is extended by the Securities and Exchange Commission. Detailed steps to consummate such disposition, in the event that all common stockholders of Niagara Hudson have not exchanged such stock (plus cash when required) for common stock of the New Operating Company hereunder, shall be determined by the Board of Directors of Niagara Hudson subject to further approval by the Securities and Exchange Commission.

No dividends will be declared or paid on the presently outstanding common stock of Niagara Hudson until the indebtedness of Niagara Hudson has been paid. When such indebtedness has been paid, Niagara Hudson will distribute the remaining shares of common stock of the New Operating Company pro rata to the remaining holders of common stock of Niagara Hudson and thereafter dissolve.

Whatever cash or other assets are held by Niagara Hudson at the time of dissolution will be paid over to the New Operating Company after all expenses in connection with the dissolution have been paid or provision has been made for such payment.

Class B Stock Option Warrants

No provision is made herein nor is contemplated to be made by Niagara Hudson in respect to the outstanding Class B stock option warrants which are deemed without present or reasonably potential value. All rights of such warrant holders shall cease and terminate as of the effective date of the Plan.

Listing on National Securities Exchange

Application will be made to list the Class A stock of the New Operating Company on a national securities exchange as soon as is possible in conformity with the rules of such exchange. Application will be made to list the common stock of the New Operating Company on a national securities exchange as soon as the rules of such exchange will permit.

General

The Plan is subject to the following conditions:

(1) The Plan may be supplemented, amended or modified in whole or in part by action of the Board of Directors of Niagara Hudson at any time prior to approval thereof by the Securities and Exchange Commission. After being approved by such Commission, the Plan may be

supplemented, amended or modified in whole or in part by action of the Board of Directors of Niagara Hudson with the approval of such Commission. The term "Plan" herein shall be deemed to mean the Plan as so supplemented, amended or modified.

(2) The Plan shall have been found by the Securities and Exchange Commission to be necessary or appropriate to effectuate the provisions of Section 11(b) of the Act and to be fair and equitable to all the persons affected thereby, and all actions requisite to the consummation of the Plan shall have been ordered by such Commission.

(3) The Securities and Exchange Commission shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act, and such court shall have entered an order finding the Plan to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act and directing action to be taken to carry out the mandatory terms and provisions of the Plan.

(4) The order of the Securities and Exchange Commission shall recite that the transactions of the Plan are necessary or appropriate to the simplification of the holding-company system of which Niagara Hudson is a member and necessary or appropriate to effectuate the provisions of Section 11(b) of the Act, all in accordance with the meaning and requirements of Supplement R and Section 1808(f) of the Internal Revenue Code, as amended.

Miscellaneous

Niagara Hudson will pay such fees and remuneration for services rendered and make such reimbursement for proper costs incurred in connection with the Plan and the proceedings relating thereto as the Securities and Exchange Commission shall finally determine, award, allow or allocate upon petition of any interested person.

A ruling on the question of the tax treatment of the exchanges under Federal Income Tax Laws as respects Niagara Hudson stockholders will be requested from the United States Commissioner of Internal Revenue.

The statements, opinions, estimates, computations and conclusions contained in this Plan are submitted solely for the purpose of assisting the Securities and Exchange Commission, the stockholders of Niagara Hudson involved, and other parties in interest in any steps or proceedings with respect to the Plan, and are not intended for use or information of prospective purchasers of any stocks or other securities, whether now existing or proposed to be issued; and no one is authorized to make any statements regarding the Plan, whether with reference to any stocks or other securities referred to herein or otherwise, which are not set forth herein.

Dated: August 23, 1949.

By Order of the Board of Directors.

NIAGARA HUDSON POWER CORPORATION

By EARLE J. MACHOLD
President

EXHIBIT F

EXHIBIT, F

103

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the 25th day of August, A. D. 1949.

In the Matter of NIAGARA HUDSON POWER CORPORATION File Nos. 54-170 54-172 (Public Utility Holding Company Act of 1935)	**Order Approving Amended Plans Under Section 11(e)**

The Niagara Hudson Power Corporation ("Niagara Hudson"), a registered holding company, having filed Plans, and amendments thereto, pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 ("the Act"), providing, in substance, for:

(a) The consolidation of Niagara Hudson's three major subsidiaries, Buffalo Niagara Electric Corporation, Central New York Power Corporation, and New York Power and Light Corporation, into a single new electric and gas utility company ("the New Operating Company");

(b) The issuance by the New Operating Company of Class A and Common Stock to Niagara Hudson, which will distribute such stock to its stockholders as follows: 4 shares of Class A Stock for each share of Niagara Hudson First and Second Preferred Stock and, for a period of six months, .78 share of new common stock for each share of Niagara Hudson Common Stock plus a ratable amount of cash per share of Niagara Hudson Common Stock equal to its outstanding bank loan;

(c) The eventual dissolution of Niagara Hudson; and

Niagara Hudson having requested that the Commission's order herein conform to the pertinent requirements of the Internal Revenue Code as amended, including Section 1808(f) and Supplement R thereof; and

Niagara Hudson having requested the Commission, pursuant to Section 11(e) of the Act, to apply to a court to enforce and carry out the terms and provisions of the Plans; and

Public hearings and oral argument having been held after appropriate notice at which security holders and other interested participants were afforded an opportunity to be heard; and

The Commission having considered the record, and on August 16, 1949, having issued its Findings and Opinion, concluding therein that the Plans are necessary to effectuate the provisions of Section 11(b)(2) of the Act and fair and equitable to the persons affected thereby, if amended in certain respects, including a change in the allocation to Niagara Hudson Second Preferred Stockholders from 4 shares of Class A Stock for each such share to 3.9 shares of Class A Stock for each such share; and

Niagara Hudson on August 25, 1949, having further amended its Plans as suggested by the Commission in its Findings and Opinion of August 16, 1949:

IT IS ORDERED, pursuant to Section 11(e) and other applicable provisions of the Act, that:

(1) The Plans as modified be, and hereby are, approved, and that the applications and declarations with respect to the transactions involved in consummation of the Plans be, and they hereby are, granted and permitted to become effective, subject to the conditions specified in Rule U-24 of the General Rules and Regulations promulgated under the Act;

(2) Jurisdiction be, and hereby is, reserved to entertain such further proceedings, to make such supplemental findings, to take such further action, and to enter such further orders as the Commission may deem necessary or appropriate in these proceedings;

(3) Jurisdiction be, and hereby is, reserved over the reasonableness and appropriate allocation of all fees and expenses incurred and to be incurred by Niagara Hudson in connection with the Plans and the transactions incident thereto;

(4) Counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith, on behalf of the Commission, to an appropriate United States District Court, pursuant to the provisions of Section 11(e) and in accordance with subsection (f) of Section 18 of the Act, to enforce and carry out the terms and provisions of the Plans;

(5) This Order shall not be operative to authorize the consummation of the transactions proposed in the Plans until an appropriate United States District Court shall, upon application thereto, enter an order enforcing said Plans.

IT IS FURTHER ORDERED AND RECITED that the transactions proposed in the aforesaid Plans to be effected by Niagara Hudson and the New Operating Company, including particularly those hereinafter described and recited, are necessary or appropriate to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935 and are hereby authorized, approved and directed:

(1) The issuance by the New Operating Company of 200,000 shares of Preferred Stock, 3.40% Series, 350,000 shares of Preferred Stock, 3.60% Series, and 240,000 shares of Preferred Stock, 3.90% Series;

(2) The issuance by the New Operating Company of 9,580,989 shares no par value common stock;

(3) The transfer or conveyance to the New Operating Company upon and by the effect of the consolidation of New York Power and Light Corporation, Central New York Power Corporation and Buffalo Niagara Electric Corporation into the New Operating Company of all the right, title and interest of New York Power and Light Corporation, Central New York Power Corporation and Buffalo Niagara Electric Corporation, or any of them, in and to any lands, tenements or realty;

(4) The transfer to the New Operating Company upon and by the effect of the consolidation of New York Power and Light Corporation, Central New York Power Corporation and Buffalo Niagara Electric Corporation into the New Operating Company of all the right, title and interest of New York Power and Light Corporation, Central New York Power Corporation and Buffalo Niagara Electric Corporation, or any of them, in and to 742,241 shares of the common stock, no par value, of The Niagara Falls Power Company, and 266 shares of the common stock of Indian River Company;

(5) The transfer by Niagara Hudson to the New Operating Company of 69,466 shares of the common stock of Frontier Corporation, 100 shares of the common stock of The Oswego Canal Company, 4,000 shares of the common stock of St. Lawrence Power Company, Limited, 1,127 shares of the "B" Preferred Stock of Carthage National Exchange Bank, 842 shares of the common stock of Moreau Manufacturing Corporation, and $40,000 in principal amount of 4% Debentures of Syracuse Trust Company;

(6) The issuance by the New Operating Company to Niagara Hudson of 1,928,627 shares of Class A Stock and 7,473,172 shares of common stock (as reclassified) of the New Operating Company in exchange for and upon surrender by Niagara Hudson of the 9,580,989 shares of common stock of the New Operating Company as initially issued;

(7) The distribution by Niagara Hudson of 1,928,627 shares of Class A Stock in exchange for all of the First and Second Preferred Stocks of Niagara Hudson and the transfer and surrender of such preferred stocks to Niagara Hudson;

(8) The distribution by Niagara Hudson of 7,473,172 shares of common stock of the New Operating Company (as reclassified) in exchange for common stock of Niagara Hudson and the transfer and surrender of such Niagara Hudson Common Stock to Niagara Hudson.

By the Commission.

For ORVAL L. DUBOIS,
Secretary.

(SEAL.)

By NELLYE A. THORSEN,
Assistant Secretary.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS OF M. VICTOR LEVENTRITT, CLASS B OPTION WARRANT HOLDER

To the Honorable Judges of the District Court of the United States for the Northern District of New York:

M. VICTOR LEVENTRITT, a holder of 8,000 Class B option warrants, having objected in the proceedings before the Securities and Exchange Commission to the "Dissolution Plan" filed by Niagara Hudson Power Corporation, now renews those objections and further objects to the enforcement of the said Dissolution Plan and particularly that portion of Plan under which

> "No provision is made for the outstanding Class B stock option warrants of Niagara Hudson, which are deemed to be without present or reasonably potential value, and all rights of such warrant holders will terminate as of the effective date."

Objector also more particularly states his objections as follows:

1. Objector objects to the finding in the last paragraph of Page 34 of the Findings and Opinion of the Commission herein that "such option warrants have no recognizable value and that the plans satisfy the standard of fairness and equity with respect to such option warrants in excluding them from any participation in the reorganization of [fol. 19] Niagara Hudson" on the ground that such a finding is unsupported by any substantial evidence and further, is contrary to the evidence before the Commission.

2. Objector objects to the said finding as being inconsistent with the finding (footnote same page of Findings and Opinion) that the perpetual feature of the warrants has some present value.

3. Objector objects to the finding in the said footnote that "The value to be accorded that right, however, in this case, is so small that as a practical matter we would not be justified in recognizing it for the purposes of a Section 11 reorganization," as being unsupported by any substantial evidence and further, as being insufficient in law to support the conclusion that the option warrants should be excluded from participation. Having found that the option warrants have value, the Commission erred in not finding what that value was so that

this Court would have before it facts and findings of fact on which it could determine whether or not an interest of such value could be eliminated and destroyed with no compensation whatsoever. Objector further states that no interest of value can be destroyed without compensation without a finding based on substantial evidence that such interest has a value of less than 6¢.

4. The Securities and Exchange Commission erred in failing to consider and give weight to the evidence in the record that the option warrants have had substantial market value.

5. The Securities and Exchange Commission erred in applying a test of value for the option warrants different from that applied in other proceedings under this Act and particularly in the Electric Power & Light Corporation reorganization.

[fol. 20] 6. The Commission erred in ignoring the possibility that the market price of Niagara Hudson common stock may in the future exceed the present reasonable expectations of the SEC and in depriving the holders of the option warrants of their contract rights to share in any such unforeseen improvements.

7. The Commission erred in refusing to recognize the fact that the future prices of securities are not capable of accurate prediction and in refusing to evaluate the inevitable margin of error in any such calculations by it or anybody however expert. The SEC erred in that the extinction of the option warrants without compensation deprives the holders thereof of valuable rights without due process of law and is a violation of the Public Utility Holding Company Act of 1935 and of the Fifth Amendment of the United States Constitution. The Objector alleges, in support of the foregoing, that but for the improper action of the Commission herein, the option warrants would have the value of approximately $3 per option warrant and that this estimate is supported by the market history of said option warrants.

M. Victor Leventritt, Objector, *pro se*.

[fol. 21] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

Civil No. 3476

In the Matter of NIAGARA HUDSON POWER CORPORATION, BUFFALO NIAGARA ELECTRIC CORP., CENTRAL NEW YORK POWER CORP., NEW YORK POWER & LIGHT CORP.

Appearances:

Harry G. Slater, Esquire, Attorney and Counsellor at Law, Chief Counsel, and Herbert D. Miller, Esquire, Attorney and Counsellor at Law, 425 Second Street, S.W., Washington, D. C., appearing in behalf of the Securities & Exchange Commission.

Lauman Martin, Esquire, Attorney and Counsellor at Law; Randall J. Le Boeuf, Jr., Esquire, Attorney and Counsellor at Law, and William N. Mason, Esquire, Attorney and Counsellor at Law, 15 Broad Street, New York, N. Y., appearing in behalf of the Niagara Hudson Power Corporation.

Messrs. Whitman, Ransom, Carlson & Goetz, Attorneys and Counsellors at Law, 40 Wall Street, New York, N. Y., by Richard Joyce Smith, Esquire, appearing in behalf of the United Corporation.

Messrs. Wolf, Block, Schorr & Solis-Cohen, Attorneys and Counsellors at Law, Packard Building, Philadelphia, Pa., by Morris L. Forer, Esquire, appearing for David J. Green, et al.

Messrs. Sullivan & Worcester, Attorneys and Counsellors at Law, 50 Federal Street, Boston, Mass., by John N. Worcester, Esquire, and Robert B. Luick, Esquire, appearing in behalf of Niagara Share Corporation and Lehman Corporation and State Street Investment Corporation.

Martin Taylor, Esquire, Attorney and Counsellor at Law, and Paul D. Nulle, Esquire, Attorney and Counsellor at Law, 2 Wall Street, New York, N. Y., appearing in behalf of the Bankers Trust Company of New York.

Messrs. Scribner & Miller, Attorneys and Counsellors at Law, 40 Wall Street, New York, N. Y., by Charles E. Scribner, Esquire, appearing in behalf of the First Preferred Stockholders of Niagara Hudson Power Corporation.

[fol. 22] Hon. Harold Panken, Attorney and Counsellor at Law, 291 Broadway, New York, N. Y., appearing for Dr. Charles Weinreb and Mrs. Pauline Weinreb, holders of Class "B" Option Warrants.

Messrs. Cooper, Erving & Savage, Attorneys and Counsellors at Law, 35 State Street, Albany, N. Y., by B. Jermain Savage, Esquire, appearing in behalf of certain holders of First Preferred stock of the Niagara Hudson Power Corporation.

M. Victor Leventritt, Esquire, Attorney and Counsellor at Law, 30 Broad Street, New York, N. Y., appearing in his own behalf as holder of Option Warrants.

Before: Hon. J. T. Foley, D.J.

MEMORANDUM OPINION—October 31, 1949

The Securities and Exchange Commission at the request of the Niagara Hudson Power Corporation makes this application pursuant to sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935 for the approval and enforcement of a certain Consolidation Plan and Dissolution Plan. The Consolidation Plan effects the consolidation of the three principal subsidiary companies of the Niagara Hudson Power Corporation, namely, Buffalo Niagara Electric Corporation, Central New York Power Corporation and New York Power and Light Corporation into a single electric and gas utility company, tentatively described as the New Operating Company. The Dissolution Plan shall cause the ultimate dissolution of the Niagara Hudson Power Corporation as a holding company only when the Consolidation Plan shall be consummated. Both Plans were the plans of the Niagara Hudson Power Corporation and were filed for approval by the Commission in accordance with section 11(e) of the Act. (Exhibits A and E attached to application). In exhaustive Findings and Opinion, dated August 16, 1949, the Commission approved the Consolidation and [fol. 23] Dissolution Plan as necessary to effectuate the provisions of section 11(b) of the Act, and as fair and equitable to the security holders affected, subject to certain outlined modifications (Findings and Opinion, Holding Company Act Release No. 9270; "Exhibit D" attached to application). In due course the modifications were provided and on August 25, 1949, the Commission entered its order approving the Consolidation Plan and the Dissolution Plan (Holding Company Act Release No. 9295; "Exhibit G" attached to the application). The findings and opinion of the Commission, reached after due notice to all interested parties and extensive formal hearings were not unanimous but were strongly dissented to by Commissioner McEntire, in particular reference to the creation of the Class "A" convertible preference stock and the necessity of the Dissolution Plan to effectuate the provisions of section 11(b)(2) of the Act. However, in this application the majority of the Commission request judicial approval of the Plans in accordance with its Findings, Opinion and Order.

It would be burdensome, repetitious and unnecessary to the problem presented herein to discuss the financial structure and background of the Niagara Hudson Power Corporation and the three subsidiaries. These descriptive facts showing the complication of the structure and

the various proceedings to bring the companies within the spirit of the Act are sufficiently outlined by the Commission in its findings and opinion (Release No. 9270).

By its findings and order of approval, the Commission was unable to create the millennium for the various groups of stockholders. The objections filed as directed by the order of this court are generally [fol. 24] from the same class of stockholders who interposed objections before the Commission. The objectors are the holders of the First Preferred stock of the Niagara Hudson Power Company and the holders of Class "B" option warrant. New groups of First Preferred stockholders who did not participate before the Commission were represented by B. Jermain Savage at the hearing before the court on September 30, 1949. Their preliminary objection based upon the claim that they did not receive notice of the hearings before the Securities and Exchange Commission were disposed of by the filing of an affidavit of mailing to the parties concerned. A hearing and oral argument was had by the court on September 30, 1949, and the oral argument presented was an important complement by the attorneys to their written objections and briefs. An opportunity to be heard was given to individual stockholders unrepresented by counsel with the thought that our concept of due process in situations of this kind should remove technicalities of procedure and allow all interested parties their "day in court," particularly where important property rights are involved. This individual class of stockholders were within the above described groups. There was no objection by any party to the necessity of the Plan and the objection of the First Preferred and warrant holders are directed to the "fair and equitable" standard applied to them in the financial overhaul by the Commission.

It seems important now to outline my judicial function as it appears to me in this application. The Rules of the Road for such a review of approval and enforcement as herein have been set down with definiteness by the late Mr. Justice Rutledge in SEC v. Central-Illinois Securities Corporation, 69 Sup. Ct. 1377, decided June 27, 1949. His words of limitation are that the Commission findings as to valuation, [fol. 25] which are based upon judgment and prediction, as well as upon "facts", are not subject to reexamination by the court *unless they are not supported by substantial evidence or were not arrived at "in accordance with legal standards."* (Italics mine). Justice Rutledge read into section 11(e) of the Act the limiting words set forth in the alternative mode of review as provided by section 24(a) of the Act: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." I fully realize that these limitations do not prescribe an abject surrender of the judicial function to the administrative function. There must always

be careful discernment as to the substance of the evidence and whether the administrative action was contrary to law. Even the expert may become arbitrary and unconscionable. From these principles I proceed to the discussion of the objections interposed herein.

The first preferred stockholders are most sincere in their objection. Much of this particular security is held in a fiduciary relationship and their interest in the alleged unfair shrinking of value is commendable. One group of the first preferred stockholders, the Committee for the First Preferred Stock, does not challenge Class "A" stock in esse because it proposed a plan of its own to the Commission in relation thereto (Release No. 9270—Page 41—Footnote 47). The conclusion of the Commission varies from this proposed plan only in the degree of valuation to be placed upon the respective interests in the allocation of new securities. Such conclusion in that respect seems peculiarly within the province of the Commission.

[fol. 26] This Committee argues that it is not receiving the equitable equivalent of the security it surrenders. The reduction of dividend is slight, being from $5.00 to $4.80 per share. The preference to assets upon liquidation will be sacrificed. However, there are the counterbalancing equities approved by the Commission as to the Class "A" stock and set forth in its Findings and Opinion. Namely, the Class "A" stock will be securities in an operating company instead of a holding company, will have increased voting power, will be senior to the Niagara Hudson Bank loan, will have a conversion privilege into common stock which in the judgment of the Commission will result in increased earnings in the future to the holders thereof.

These conclusions of the Commission are based upon evidence not seriously disputed by the Committee and seem peculiarly within the province of the Commission under the Act. The main challenge of the Committee does not seem to be directed to the evidence upon which these conclusions are based but challenge the legal standard and admitted method of the Commission in looking to the future value of the new securities as the "fair equivalent" rather than the present value.

I cannot agree with the Committee that the Commission in adjudging the investment value to be replaced must stay within the perimeter of the present and cannot without legal error estimate the prospective future earnings of the new securities. It is true that in SEC v. Central-Illinois the court said, "Valuation on the basis of a going concern necessarily has primary relationship to value as of the time the shareholders' surrender becomes effective, not as of some earlier, remote period, or one long afterward." This particular statement

[fol. 27] from the context must be confined to the particular facts involved in that authority and must be read with the further statements in reference to exchange, i.e.: "Where the security holder is to receive new securities, the Commission is faced with a dual valuation problem. It must evaluate the security to be surrendered and the securities to be received in exchange," and then again in the same opinion, "In effect, the Commission's task was to apportion to the new stock earning power substantially equivalent to that surrendered." This method of determination necessitates a fair decision as to prospective earnings and this flexible approach to arrive at an equitable equivalent in similar situations as herein is outlined in many authorities. Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624; Consolidated Rock Products Co. v. Dubois, 312 U. S. 510, 529; In re Standard Gas & Electric Co., 151 F. (2d) 326; Lahti v. New England Power Association, 160 F. (2d) 845; Group of Investors v. Chicago, M. St. P. & P. R. Co., 318 U. S. 523. I cannot agree with the objection of the Committee as to the alleged failure of the Commission to apply legal standards.

The objections, brief and oral argument of the first preferred, represented by B. Jermain Savage, are more belligerent in their approach to the evaluation by the Commission of the new for the old. They are suspicious of the originators of the plan and claim that the common stockholders of the Niagara Hudson will receive a windfall in dividends at their expense. They decry the rationalization of the Commission that the Class "A" stock might result in the future of a yearly dividend of $6.16 instead of their guaranteed dividend of $5.00 under their present security. They unqualifiedly reject the formula of [fol. 28] the Class "A" stock as the "equitable equivalent" of their first preferred. They show by figures the lessening of their new security in the new financial arrangement. They unequivocally ask for payment of $107.50 in cash and distinguish this proceeding from other authorities because the Niagara Hudson Power Corporation is solvent.

These facts and honest contention by this particular group of first preferred stockholders are striking in their nature but in my judgment should have been directed to the Commission in their evaluation of the "equitable equivalent." This court does not possess the power to overrule the Commission in its "expert wisdom" as to valuation. There is apparent, however, an honest attempt by the Commission to soften the blow to the first preferred by the creation of the convertible Class "A" with the sincere expectation that in the future there will be a better investment value for the first preferred together with the paramount objectives of simplicity of structure and advancement of the public interest. It is interesting to note the dissension within the

ranks of the Commission which in the consideration of this problem led Commissioner McEntire to the conclusion that the majority was going too far in attempting to alleviate "hardship" to the first preferred. The claims now set forth were fully discussed by the Commission and its conclusions are adequately supported by the evidence.

The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by consideration of avoidance of harsh effects on various stock interest which might result from enforcement of charter [fol. 29] provisions of doubtful applicability to the procedures undertaken. Otis v. SEC, 323 U. S. 624, 638.

The finding of the Commission as to the investment value of Class "B" stock option warrants of Niagara Hudson is in accord with the evidence and the legal standard of determining present investment value. It is an unfortunate situation to jettison even the most inferior right. However, there is substantial evidence to bolster the conclusion of the Commission that there is not a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future.

There are no objections by the holders of the preferred stocks of the three subsidiary companies nor by the holders of the second preferred and common stock of the Niagara Hudson Power Corporation, and the findings of the Commission are amply supported by the evidence in that respect.

The objections interposed herein are dismissed as insufficient and an order may be submitted in accordance herewith approving the Consolidation Plan and Dissolution Plan, and further directing enforcement and consummation of the Plans as requested in the application herein.

Dated: Albany, New York, October 31, 1949.

[fol. 30] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 3476

In the Matter of NIAGARA HUDSON POWER CORPORATION, BUFFALO NIAGARA ELECTRIC CORPORATION, CENTRAL NEW YORK POWER CORPORATION, NEW YORK POWER AND LIGHT CORPORATION

ORDER ENFORCING PLANS—Filed November 4, 1949

Certain Plans to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935 ("the Act"), designated as "the Consolidation Plan" and "the Dissolution Plan," having been filed pursuant to Section 11(e) of the Act with the Securities and Exchange Commission ("the Commission") on May 19, 1948, and December 17, 1948, respectively, by Niagara Hudson Power Corporation ("Niagara Hudson"), a registered holding company under the Act; said Consolidation Plan providing for the consolidation of the three principal direct subsidiaries of Niagara Hudson, namely, Buffalo Niagara Electric Corporation, Central New York Power Corporation, and New York Power and Light Corporation, into a single corporation ("the New Operating Company"); and said Dissolution Plan providing for the dissolution of Niagara Hudson through the distribution of stocks of the New Operating Company to holders of the preferred and common stocks of Niagara Hudson; and the Commission, after due notice and public hearings, having issued its Findings and Opinion, dated August 16, 1949, with respect to said Plans; and the Dissolution Plan having been modified by amendments filed with the Commission on August 25, 1949; and the Commission having found the Consolidation Plan and the Dissolution Plan, as modified, necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected thereby, and having approved the Plans by appropriate order made on August 25, 1949; and Niagara Hudson having requested the Commission to apply to a proper District Court of the United States, in accordance with the provisions of Section 18(f) of the Act, to enforce and carry out the terms and provisions of the Plans, and the Commission having, on August 26, 1949, filed with this Court an application to enforce and carry out the terms and provisions of the Plans; and this Court, by order entered August 26, 1949, having fixed September 30, 1949 as the date for hearing on the Plans, and having prescribed the notice to be given of said hearing, the time within which objections might be made to the Commission's applica-

tion and the manner of making such objections; and it appearing that due and sufficient notice of said hearing was given in accordance with the provisions of said order entered August 26, 1949; and objections to the granting of the Commission's application insofar as it relates to the Dissolution Plan having been filed by or on behalf of certain holders of First Preferred Stock of Niagara Hudson, a Committee for holders of such First Preferred Stock and a certain holder of Class B Option Warrants of Niagara Hudson, all as more fully appears from the record and files of the Court herein; and a hearing having been duly held on September 30, 1949; and the Commission, Niagara Hudson and certain holders of Second Preferred Stock, Common Stock and Class B Option Warrants of Niagara Hudson having appeared at said hearing by their respective counsel in support of said application; and certain holders of First Preferred Stock of Niagara Hudson, a Committee for holders of such First Preferred Stock and certain holders of Class B Option Warrants of Niagara Hudson having appeared by their respective counsel in opposition to the granting of said application insofar as it relates to the Dissolution Plan and having presented their views with respect to the application by brief or oral argument; and all persons affected by the Plans having been fully afforded an opportunity for hearing; and this Court having duly con-[fol. 30a] sidered the Plans, the objections thereto and the record herein, and being fully advised in the premises and having filed its memorandum herein:

It Is Hereby Found, Ordered, Adjudged and Decreed:

1. The Court finds and concludes that the Commission's findings of fact and conclusions of law, embodied in its Findings and Opinion dated August 16, 1949 and in order dated August 25, 1949, set forth as Exhibits D and F, respectively, to the application herein, are supported by substantial evidence and were arrived at in accordance with legal standards.

2. The Plans are approved as fair and equitable and as appropriate to effectuate the provisions of Section 11 of the Act, and the Court hereby directs that the Plans be enforced and carried out in respect to all persons affected thereby, including all security holders of Niagara Hudson and its said three principal direct subsidiaries.

3. This Court, for the purpose of carrying out the terms and provisions of the Plans to the extent necessary for such purpose, hereby takes exclusive jurisdiction of Niagara Hudson and its said three principal direct subsidiaries and their assets and the assets, respectively, of each of them, whether now owned or hereafter acquired, wherever located.

4. Niagara Hudson and its said three principal direct subsidiaries respectively shall retain possession of their assets and continue the operation of their businesses through their respective officers, directors, employees and agents to the same extent and in substantially the same manner as heretofore, except as otherwise expressly provided by this order or any subsequent order herein, and they and each of them may enter into any transaction not inconsistent with the Plans or with this order, including the filing of any appropriate application or declaration with the Commission in conformity with the Act and the rules and regulations and orders promulgated and issued thereunder, in all cases where such filing and the entry of such orders with respect thereto would be required if this Court had not taken such jurisdiction.

5. The Plans shall become severally effective at 12:01 a. m. on January 5, 1950, unless a stay of this order is granted with respect to the Consolidation Plan or the Dissolution Plan, as the case may be, in which event the effective date of the Plan with respect to which a stay is granted shall be extended to a date to be fixed by the board of directors of Niagara Hudson, who shall fix the earliest practicable date after termination of such stay.

6. For the purpose of determining the amount of cash, if any, payable under the Plans to any security holder of Niagara Hudson or of its said three principal direct subsidiaries under the Consolidation Plan or the Dissolution Plan, as the case may be, such determination shall be made as of the first day of the calendar month in which such Plan shall become effective, and accumulation of dividends on stocks entitled to accumulate dividends shall be deemed to accumulate from such first day of said calendar month.

7. On the effective date of the Consolidation Plan, all rights and claims of the holders of the Preferred Stock, 3.60% Series of Buffalo Niagara Electric Corporation, the Cumulative Preferred Stock, 3.40% Series of Central New York Power Corporation and the Cumulative Preferred Stock, 3.90% Series of New York Power and Light Corporation then outstanding in the hands of the public (including any claim to dividends thereon from and after the first day of the calendar month in which the Consolidation Plan shall become effective), except the right to receive preferred stock of the New Operating Company, and cash, if any, in accordance with the terms and provisions of the Consolidation Plan and as therein provided, shall cease and determine.

8. On the effective date of the Dissolution Plan, all rights and claims of the holders of the First and Second Preferred Stocks of Niagara Hudson then outstanding in the hands of the public (including any claim to dividends thereon from and after the first day of the

calendar month in which the Dissolution Plan shall become effective), except the right to receive Class A stock of the New Operating Com- [fol. 30b] pany, scrip certificates and cash, if any (i. e., $.83⅓ per share as of January 1, 1950), in accordance with the terms of the Dissolution Plan and as therein provided, shall cease and determine.

9. On the ~~effective~~ date of the Dissolution Plan, all rights and claims of the holders of the Class B stock option warrants of Niagara Hudson shall cease and determine and all such warrants shall ~~be~~ void for all purposes.

10. Niagara Hudson and its subsidiaries, acting by or through their respective directors, officers and agents, are hereby authorized, ordered and directed to take or cause to be taken all action which may be necessary or appropriate to comply with this order and to carry into effect the steps and transactions contemplated by the Plans. Specifically, without limiting the generality of the foregoing:

(a) Niagara Hudson is ordered to cause the Certificate of Consolidation to form the New Operating Company to be made effective on the effective date of the Consolidation Plan, substantially as contemplated in the form of proof of such certificate dated September 6, 1949 filed by Niagara Hudson as an exhibit in this proceeding, and Niagara Hudson, acting through its President or any of its Vice Presidents, is appointed to execute the foregoing Certificate of Consolidation and to file the same in the Department of State of the State of New York, and Niagara Hudson is ordered to procure the delivery of the cash, if any, and the issuance and delivery of the securities therein provided.

(b) Niagara Hudson is ordered to cause the Certificate of Amendment of the Certificate of Incorporation of the New Operating Company reclassifying its common stock into Class A and common stock to be made effective on the effective date of the Dissolution Plan, substantially as contemplated in the form of proof of such certificate dated September 8, 1949 filed by Niagara Hudson as an exhibit in this proceeding, and the New Operating Company, acting through its President or any of its Vice Presidents, is appointed to execute the foregoing Certificate of Amendment and to file the same in the Department of State of the State of New Yor , and Niagara Hudson is ordered to procure the issuance and delivery of the securities therein provided.

(c) Niagara Hudson is ordered to give notice of the effective date of the Consolidation Plan, not less than 10 days prior

thereto, to each holder of record of the outstanding preferred stocks of its said three principal direct subsidiaries by mail, postage prepaid, and by publication once in a daily newspaper of general circulation and published in each of the cities of New York, Albany, Syracuse and Buffalo, in the State of New York, Boston, Massachusetts, Philadelphia, Pennsylvania, and Chicago, Illinois.

(d) Niagara Hudson is ordered to give notice of the effective date of the Dissolution Plan, not less than 10 days prior thereto, to each holder of record of its outstanding preferred stocks and common stock by mail, postage prepaid, and by publication once in a daily newspaper of general circulation and published in each of the cities specified in subdivision (c) above.

(e) Niagara Hudson is ordered to offer to the holders of its common stock from and after the effective date of the Dissolution Plan for a period of 6 months, subject to the provisions of sub-paragraph (f) hereof, .78 share of common stock of the New Operating Company, as reclassified, in exchange for one share of common stock of Niagara Hudson plus a ratable amount of cash per share of Niagara Hudson comon stock necessary to pay off Niagara Hudson's bank loan outstanding at the effective date of the Dissolution Plan, and to give notice of said offer, not more than 10 days subsequent to the effective date of the Dissolution Plan, to each holder of record of the common stock of Niagara Hudson by mail, postage prepaid, and by publication once in a daily newspaper of general circulation and published in each of the cities specified in sub-paragraph (c) above, and to accept tenders in accordance with said offer.

(f) Niagara Hudson is ordered to reduce the amount of cash payable by the holder of each share of common stock of Niagara Hudson pursuant to the offer provided in sub-paragraph (e) above whenever the ratable amount of cash per share of Niagara Hudson common stock necessary to pay off Niagara Hudson's outstanding bank loan is reduced by a total of $.20 or more per share and to give notice of such reduction to the holders of its common stock at least 10 days prior to such reduction by publication once in a daily newspaper of general circulation and published in the cities specified in sub-paragraph (c) above.

[fol. 30c] 11. Not more than 30 days subsequent to the expiration of each year after the effective date of the Dissolution Plan, to and including the fifth year after such effective date, the New Operating Company shall give notice that scrip certificates for common stock of such company will not be exchangeable for such common stock after the expiration of six years after the effective date of the Dissolution Plan, such notice to be given by publication once in a daily newspaper of general circulation and published in each of the cities specified in subdivision (e) of paragraph 10 above.

12. Not more than 30 days subsequent to June 30, 1950 and to June 30, 1951, the New Operating Company shall give notice that scrip certificates for Class A stock of such company will not be exchangeable for such Class A stock after June 30, 1952, such notice to be given by publication once in a daily newspaper of general circulation and published in each of the cities specified in subdivision (c) of paragraph 10 above.

13. Not more than 30 days subsequent to the sale of any shares of Class A stock or of common stock of the New Operating Company represented by outstanding scrip certificates, the New Operating Company shall give notice that the proceeds of such sale are held without accountability for interest for the account of the holders of scrip certificates for Class A stock or common stock, as the case may be, for a period of two years, after which all such unsurrendered scrip certificates shall become void, such notice to be given by publication once in a daily newspaper of general circulation and published in each of the cities specified in subdivision (c) of paragraph 10 above.

14. On the expiration of 10 years from the effective date of the Dissolution Plan, all rights and claims of holders of the First and Second Preferred Stocks of Niagara Hudson who have not surrendered their certificates for such stock as herein provided shall cease and determine, and all such certificates shall be void for all purposes, and Niagara Hudson shall give notice thereof annually for nine years after the effective date of the Dissolution Plan, and twice during the succeeding tenth year, by publication once in a daily newspaper of general circulation and published in each of the cities specified in subdivision (c) of paragraph 10 above, and once in the tenth year by mail to all known holders of certificates for preferred stocks of Niagara Hudson insofar as their identity may be known to Niagara Hudson. All shares of Class A stock of the New Operating Company held for exchange for shares of the First and Second Preferred stocks of Niagara Hudson as provided in the Dissolution Plan shall, on the expiration of 10 years from the effective date of such Plan, be surrendered to the New Operat-

ing Company as unclaimed by such preferred stockholders of Niagara Hudson.

15. All creditors and holders of securities issued by Niagara Hudson or any of its subsidiaries, and all other persons, firms and corporations whatsoever, are hereby permanently enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with, these proceedings or with the enforcement or carrying out of the respective Plans or any of the terms and provisions thereof, or with compliance with the Commission's order dated August 25, 1949, or with compliance with this order, including, without any limitation on the foregoing, the institution or prosecution of any action, suit or proceeding at law or in equity or under any statute, in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be appropriate under the Act or the rules and regulations promulgated by the Commission thereunder, and such review, if any, in an appropriate Court of Appeals as may be provided by law.

16. This Court reserves jurisdiction to entertain such further proceedings, to make such further findings, to enter such supplementary orders and decrees, to take such further action and to grant such other and further relief as may be necessary or appropriate to carry out the provisions of the Plans or the transactions incident thereto.

By the Court, James T. Foley, U. S. D. J.

Dated: Albany, N. Y., November 4, 1949.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED CHANGES TO ORDER SUBMITTED BY THE SECURITIES & EXCHANGE COMMISSION

1. Page 3, paragraph 3 should have added at the end thereof the following:—with the exception of the issues presented in the appeal of M. Victor Leventritt, Class B option warrant holder, now pending in the United States Court of Appeals for the Second Circuit.

2. Page 4, paragraph 5 should read as follows:—The consolidation plan shall become effective at 12:01 A. M. on January 5, 1950 and a dissolution plan shall become effective at 12:01 on May 4, 1950 unless a stay . . . (as in the second line of said paragraph No. 5 and down to the end of said paragraph).

3. Page 7, paragraph 10(d), line 4 should read as follows:—its outstanding preferred stocks, common stock and Class B option warrants by mail, . . .

M. Victor Leventritt, Class B Option Warrant Holder, Attorney pro se, 30 Broad Street, New York 4, New York.

Considered and Denied November 4, 1949. James T. Foley, U. S. D. J.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT—Filed November 8, 1949

Notice is hereby given that M. Victor Leventritt, a holder of option warrants of Niagara Hudson Power Corporation, hereby appeals to the United States Court of Appeals for the Second Circuit from the order approving and enforcing Niagara's Plan for compliance with Sections 11(b) (1) and 11(b) (2) of the Public Utility Holding Company Act of 1935, dated November 4, 1949, and for such other and further relief as is just and proper.

Dated: November 7, 1949.

M. Victor Leventritt, Attorney Pro Se, 30 Broad Street, New York 4, New York.

To Clerk of the United States District Court, Northern District; Harry G. Slater, Esq., Attorney for the Securities & Exchange Commission, Washington 25, D. C., LeBoeuf & Lamb, Esqs., 15 Broad Street, New York, New York; Whitman, Ransom, Coulson & Goetz, Esqs., 40 Wall Street, New York, New York; Morris L. Forer, Esq., Wolf, Block, Schorr & Solis-Cohen, 15th and Chestnut Streets, Philadelphia, Pa.; Sullivan & Worcester, Esqs., 50 Federal Street, Boston, Mass.; Martin [fols. 33-34] Taylor, Esq., 2 Wall Street, New York, New York; Scribner & Miller, Esqs., 40 Wall Street, New York, New York; Harold Panken, Esq., 291 Broadway, New York, New York; Cooper, Erving & Savage, Esqs., 35 State Street, Albany, New York; Morgan, Lewis & Bockius, Esqs., 123 South Broad Street, Philadelphia, Pa.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY UNDER RULE 75(d) FEDERAL RULES OF CIVIL PROCEDURE—Filed December 24, 1949

A concise statement of the points on which appellant intends to rely is as follows:

1. The SEC committed error of law by completely ignoring the perpetual call feature of the Niagara Hudson option warrants.

2. It was error of law to refuse to "recognize" the admitted value of such a perpetual feature.

3. The value of such a feature is substantial.

4. By wiping out the option warrants, the SEC has, without compensation, given to one class of security holders what they sold to another class. By so doing, it has violated the standards of the Act.

5. The shifting of investment values referred to in the point immediately preceding is a deprivation of property without due process of law within the prohibition of the Fifth Amendment of the United States Constitution.

6. The SEC committed error of law by failing to apply the appropriate test of value to the option warrants, namely, their fair market value.

7. The Plan, insofar as it extinguishes the option warrants without compensation, is not necessary within the meaning of the Act.

8. The Plan, insofar as it extinguishes the option warrants without compensation, is not fair and equitable within the meaning of the Act.

[fols. 36-37] 9. The finding of the SEC that the option warrants have no "recognizable" value, is not based upon substantial evidence and is erroneous.

Dated: December 21, 1949.

M. Victor Leventritt, Option Warrant Holder, Pro se.

[fol. 38] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
OCTOBER TERM, 1949

No. 156

(Argued January 4, 1950. Decided February 1, 1950.)

Docket No. 21566

SECURITIES AND EXCHANGE COMMISSION and NIAGARA HUDSON POWER CORPORATION, Appellees,

v.

M. VICTOR LEVENTRITT, Appellant

Before L. Hand, Swan and Clark, Circuit Judges

On appeal by a security holder from an order of the District Court for the Northern District of New York, "enforcing" a plan of reorganization of the Niagara Hudson Corporation, submitted to the Securities and Exchange Commission, under Section 11(e) of the Public Utility Holding Company Act of 1935.*

[fol. 39] Roger S. Foster for the Securities and Exchange Commission.

Lauman Martin for the Niagara Hudson Power Corporation.

M. Victor Leventritt for the appellant.

OPINION

L. HAND, Circuit Judge:

The appellant is the holder of "warrants," issued by a public utility holding company, which was in voluntary reorganization under § 11 (e) of the "Public Utility Holding Company Act of 1935."* Each "warrant" gave the holder a perpetual right to call upon the company to issue one and a sixth shares of common stock at $50: *i.e.*, a "call" on the common shares at $42.86 a share. The "Plan" submitted by the company did not provide for the issue of any substitute for the "warrants" by the new corporation, which was for the most part an operating company. To this feature of the "Plan" the appellant objects: he insists that, if no securities of the new company are to take the place of the "warrants," at least some cash must be paid upon their extinction. The Securities and Exchange Commission,

* § 79 (k) (e), Title 15, U. S. C.

upon consideration of the history of the company and of its "foreseeable" future, aided by a computation of "unaffiliated" engineers, concluded that the "warrants" had no value and approved the "Plan" in this, as in almost all other respects. On petition by the Commission to the district court to "enforce" the "Plan" under § 11 (e) of the Act ** the judge granted an "enforcing" order, from which this appeal has been taken.

[fol. 40] Section 11 (a) * imposes the duty upon the Commission to decide how far the "corporate structure" of a registered holding company "may be simplified" and "unnecessary complexities therein eliminated"; and in the discharge of that duty the Commission was free to eliminate such securities as these, constituting as they did a perpetual right to demand an increase in the common shares of the new company. Such a possible future increase in the capital of a public utility company might well be deemed, certainly a needless, and perhaps a disturbing, "complexity" in its "structure." Indeed, we are not sure that the appellant seriously disputes this omission from the "Plan"; he does insist, however, that any such action must be conditional upon giving the "warrant" holders a fair equivalent in cash; and the Commission and the company concede as much. Therefore, the only issue is whether it was permissible to appraise the "warrants" as worthless.

The evidence consisted of quotations over a period of about twenty years of the common shares of the old company, and of the "warrants"—the last presumably bought and sold "over the counter"—; and of an estimate by the expert of the probable future earnings of the new company. The quotations showed no steady proportion between the value of the shares and of the "warrants," though that was indeed to be expected, for the lower the value of the shares, the less the chance that a call at $42.86 could ever have any value. An examination of the quotations confirms this *a priori* inference. For example, during the four years, 1941-1944, when the shares were at the lowest, the average of the low for the shares was about one and a half, and the average of the low for the "warrants" was one-sixteenth, so that proportion was about one to twenty-four. On the other hand, [fol. 41] in the six high years, 1933-1939, when the average of the high for the shares was nearly thirteen, and the average of the high for the "warrants" was two and a half, the proportion was about one to five. This variation was not important; what was important was that at no time did the "warrants" become worthless, not even when the

** § 79 (k) (d), Title 15, U. S. C.

* § 79 (k) (a), Title 15, U. S. C.

shares had gone down to their low of seven-eighths. The Commission estimated the present value of the old shares at sixteen; and if we look to the years, 1933, 1936, 1937 and 1946, when the high of the shares varied between fifteen and eighteen and a quarter (with an average of about sixteen), the corresponding high of the "warrants" varied between two and a quarter and five (with an average of about three and a half), the proportion being then about one to four and a half. So far, therefore, as a long series of sales is evidence of value, the "warrants" had substantial value.

When we turn to the estimate by the expert, based upon the prospective earnings of the new company for the four years following the "Plan"—1949-1952—this conclusion is fortified. The average for these was about twenty-two million dollars, which the Commission cut to sixteen and a half millions and it estimated that the new shares might safely expect dividends of no more than $1.40. Taking fifteen as a fair capitalizing figure, the new shares would be worth in the neighborhood of $21. The old shareholders were given .78 of a new share for one old share upon the payment of one dollar twenty or one dollar sixty per share. Thus, even though we take the higher payment, the old shares on this appraisal were worth $14.78 a share and the "warrants" had a substantial value. In conclusion, therefore, not only can we find nothing in the record to support a finding that the "warrants" were worthless; but there is positive evidence from several lines of approach that they had a very real value.

[fol. 42] There is a dearth of authority in the courts touching the appraisal of such property; we have found no other decisions than our own in *In Re Electric Power and Light Corporation*,* affirming a finding of the Commission which appraised "warrants" at one-third the value of shares worth $25; and the decision of Chief Judge Leahy in *In Re Commonwealth & Southern Corporation*,** which affirmed a finding of the Commission that the "warrants" were worthless. Before it decided the case at bar the Commission had ruled upon the point in only three cases, two of which were those just mentioned, and the third, in the reorganization of the Community Gas & Power Company.† In the last case the "warrant" holders had a call upon the shares at five dollars, which the company's "Plan" recognized by giving them, one new share for every five "warrrants," as against one-half a new share for each old share of common. This the Commission raised to one-third of a share

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* 176 Fed. (2) 687, 691.

** 84 Fed. Supp. 809.

† *In Re Community Gas & Power Company, et al.* Holding Company Act Release No. 6436.

for each "warrant." The denial of all value to the "warrants" in *In Re Commonwealth & Southern Corporation* was because the call was at $30 a share, and the shares had never after 1931 sold for more than $6⅞; so that the call could have no value unless the old shares rose to four and a half times their highest value since that year. Moreover, there was no evidence that the "warrants" had ever sold in any market.

Like every other option, "warrants" are inevitably aleatory; they are the result of a willingness to pay cash for the chance that the market's judgment as to the future of the property may be too unfavorable. [fol. 43] That willingness may, or may not, be the result of a rational forecast; and if it were possible to separate those instances in which it is a rational forecast from those in which it is a mere throw of the dice, it might be desirable to refuse protection to the second. We may even assume *arguendo* that because of the possibility that the forecasts may be no more than a gamble, Congress might sweep away all such options, and deny them recognition. However, until it does so we must suppose that that recognition which the law in general gives them, Congress did not mean to withdraw in reorganizations. The Commission has never even remotely intimated an opposite opinion; and the decision of the supreme Court in *Otis* v. *Securities and Exchange Commission* * appears to us to have recognized property whose value was quite as speculative as this. In that case the common shares of a company in reorganization had no "equity" over the preferred shares at the existing values of the assets, yet the Commission allowed them something out of the pockets of the preferred; and the court affirmed its ruling. That necessarily involved holding that, although the estimate of "foreseeable" earnings did not justify a conclusion that they would ever leave a margin over the preferred dividends, the chance that there might be a margin was not to be denied the common stock which had contributed to the original venture.

In the course of its opinion in the case of the *Electric Bond & Share Company*, the Commission, in speaking of such "warrants," said: "it appears that a substantial portion of the market's valuation of the warrant derives from the greater speculative possibilities provided by like amounts of capital, if used to purchase warrants rather than common stock." That may well be true, and the Commission [fol. 44] was of course free to use it as a factor in its appraisal of the "warrants" at bar, although it is indeed a nebulous factor. But any appraisal whatever must be largely composed of nebulous factors, and, to speak frankly, can at best be no more than as honest a guess as possible. Besides, it must be remembered that the finding that the

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* 323 U. S. 624.

"warrants" at bar had no value whatever was just as much of a guess, as a finding that they had some particular value. We are forced to deal in prophecies in any event; and, unless courts are to have no review at all, they cannot avoid acting upon such impalpable ingredients. Clearly there can be appraisals which no "substantial evidence" supports; and one guess is not as good as another, unless all findings of the Commission are to be final. Hence, much as we hesitate to interfere upon such an issue, we cannot agree that there was any evidence "substantial" or insubstantial to support the finding that these "warrants" were wholly worthless. We have no intention of suggesting what that value should be; that is for the Commission to decide; all we hold is that the record as it stands does not in our judgment justify the finding actually made.

That part of the order of the District Court which enforces the provisions of the appellee's Dissolution Plan relating to the outstanding Class B stock option warrants of the appellee be and it hereby is reversed; cause remanded for further proceedings not inconsistent with the foregoing opinion; in all other respects the appeal is dismissed.

OPINION

CLARK, Circuit Judge (concurring in the result).

The attack on the plan's treatment of these warrants developed only at the very end of the proceedings before the Commission, and apparently then appeared as a small issue amid a series of other important ones. Because of this it does not appear in the record that the Commission considered the market quotations, now deemed so important; and I am willing to have the cause go back to the Commis- [fol. 45] sion to make new and more detailed findings as to the value of these warrants. But I do wish to emphasize that we cannot now properly make any decision that the warrants do have more than a purely nominal value; and if the opinion can be taken as so intimating, I must express disagreement. The opinion cites and relies only on these market quotations and does not mention the strong case the Commission builds to show that, except for a gambler's chance in the market, the warrants will never produce results from the holders. This is based on past, present, and prospective earnings, and the small possibilities of increased income in this state-regulated utility to a point where the vast gap between present values and those necessary to make the warrants usable will be made up; it represents in general the values soundly to be put upon the various security interests in any but a speculative market.

Thus the old shares would have to treble from the value of $14.78, which the court now puts on them in the light of market quotations, to something above the $42.86 exercise price before the warrants would have any value so far as actual use is concerned. Perhaps no one can say beyond peradventure that the price of the shares may not increase to that remarkable extent or that New York may not let the business thus prosper. But a function of the Commission is to gaze into the future; and it is within its province to evaluate as best it can the possibility of such prosperity. *De minimis non curat lex* is still a salutary principle; and if, as the Commission now argues persuasively, the possibility of these warrants ever having any exercise value is so remote as to be unreal, then payment to the warrant holders is not only not necessary, but positively unlawful.

The court is properly concerned with protecting the warrant holders from the destruction of any valuable right they may have. If these [fol. 46] warrants do have any real value and they are awarded a lesser sum or adjudged completely worthless, a confiscation will be worked which the Commission, in common with our court, would abhor. But we must not overlook the fact that the reverse is also true, and that to pay these warrant holders any more than the real value of their warrants is to take assets unjustly from the owners of the common stock. Care must be taken lest the emphasis on rights be all one way. Valuation of future contingencies is not an exact science, and the Commission can only make its best expert guess. While I agree that it must consider the market quotations for the warrants, it will then be for it to decide how far, if at all, this rebuts the strong arguments heretofore presented that the warrants are without any substantial value.

[fol. 47] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Learned Hand, Chief Judge, Hon. Thomas W. Swan, Hon. Charles E. Clark, Circuit Judges.

In the Matter of NIAGARA HUDSON POWER CORP., et al., M. VICTOR LEVENTRITT, Appellant

JUDGMENT—Filed February 1, 1950

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that that part of the order of said District Court which enforces the provisions of the appellee's Dissolution Plan relating to the outstanding Class B stock option warrants of appellee be and it hereby is reversed; cause remanded for further proceedings not inconsistent with the opinion of this court; in all other respects the appeal is dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fols. 48-73] [File endorsement omitted.]

[fol. 74] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER AMENDING OPINION AND JUDGMENT—Filed February 14, 1950

A motion having been made herein by counsel for appellee Niagara Hudson Corporation to clarify and amend the opinion and judgment of this court.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

Further ordered that the last paragraph of the court's opinion be deleted and that in lieu thereof the following be substituted:

> "That part of the order of the District Court which enforces the provisions of the appellee's Dissolution Plan relating to the outstanding Class B stock option warrants of appel-

lee be and it hereby is reversed; cause remanded for further proceedings not inconsistent with the foregoing opinion; in all other respects the appeal is dismissed."

Further ordered that the judgment be amended accordingly.

Alexander M. Bell, Clerk.

[fol. 75] [Endorsed:] United States Court of Appeals, Second Circuit. In re Niagara Hudson Power Corp., et al., M. Victor Leventritt, Appellant. Order. United States Court of Appeals, Second Circuit. Filed Feb. 14, 1950. Alexander M. Bell, Clerk.

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN THE MATTER OF NIAGARA HUDSON POWER CORPORATION, M. VICTOR LEVENTRITT, *Appellant.*	No. 21566

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

PETITION OF APPELLEE, SECURITIES AND EXCHANGE COMMISSION, FOR REHEARING

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission,
425 Second Street, N. W.,
Washington 25, D. C.

February 15, 1950.

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of NIAGARA HUDSON POWER CORPORATION, M. VICTOR LEVENTRITT, *Appellant.*	No. 21506

PETITION FOR REHEARING

The Securities and Exchange Commission, appellee herein, respectfully petitions the Court for rehearing of this appeal. The Court's opinion was filed February 1, 1950.

As the concurring opinion states, the Commission in common with the Court would abhor the "confiscation" which would result either from the Niagara Hudson warrant holders receiving a lesser sum than any "real value" they may have, or from their receiving at the expense of the old stockholders more than the "real value" of their warrants. We believe, however, that the Court's opinion overlooks relevant criteria as to the legal standards which should apply to that determination, and does not afford an appropriate guide concerning the Commission's duties on remand.

1. The Court holds, "We cannot agree that there was any evidence 'substantial' or insubstantial to support' the finding that these 'warrants' were wholly worthless."

The Court accepts, however, the adequacy of the evidence in the record concerning the assets of Niagara Hudson and its subsidiaries and concerning the past and prospective earnings. On the basis of this evidence the Court concludes that application of a fair capitalization rate to the prospective earnings indicates a value for the old stock equal to $14.78 as compared to the exercise for the warrants of $42.86 per share. In other words, apart from whatever allowance is to be made for the inherent uncertainty of any valuation applicable to the old common stock, the intrinsic value of a warrant is minus $30.00. To transmute this *prima facie* minus value into some positive value compensable at the expense of the common stockholders seems to the Commission to require something more than an allowance for the fact that the warrants are not limited as to time of exercise and allowance for the uncertainties inherent in the valuation process.

The prior Commission decisions cited in the Court's opinion, where warrants having an exercise price close to the value put upon the stock subject to option were accorded participations, show that the Commission in dealing with a warrant does make substantial allowance for the possibility that the best "guess" as to the value of the security subject to option may prove too modest. But there is a vast difference in degree between the allowance for uncertainties for the future made in those cases, and the allowance which would be necessary to hypothesize circumstances upon which it would ever have become advantageous to exercise the Niagara Hudson warrants if they had remained outstanding. It appeared to the Commission that such a hypothesis was too remote to warrant it in requiring a present payment from the common stockholders for the Act's frustration of the warrant contract.

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The Commission's finding of zero value for the warrants was thus essentially a negative finding: "We cannot find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future." In rejecting the Commission's valuation of the warrants, the Court's opinion inverts the statement of the problem and appears to require affirmative proof to support the zero value—in other words, proof as to how little the warrants were worth rather than how much they were worth. This posing of the problem appears to us to be based upon a misapprehension of the limited nature of the warrant holders' contract rights as well as of the holding of the *Otis* case which the Court cites as recognizing a value "quite as speculative as this."

2. The Court states with respect to the *Otis* case that the common stock "had no 'equity' over the preferred shares at the existing values of the assets" and "That necessarily involved holding that, although the estimate of 'foreseeable' earnings did not justify a conclusion that they would ever leave a margin over the preferred dividends, the chance that there might be a margin was not to be denied the common stock." We respectfully disagree with this interpretation.

The controversy in the *Otis* case turned largely on the question of whether in the liquidation of a holding company which was solvent, and indeed had substantially no debt, the preferred stockholders were entitled to treat their charter liquidation preference, including arrears, as a matured claim. If they were so entitled, then the Commission would have felt compelled to value the assets (by capitalizing prospective earnings at a fair rate commensurate with the risk factor) at less than the liquidation preference and common stockholders would have been

denied participation. The liquidation preference consisted of an initial $60,000,000 plus $38,700,000 of dividend arrears. The dividend arrears, of course, were a non-interest bearing claim and the annual preferred dividend preference was only $3,600,000 as compared to the earning forecast of $6,185,000. While this forecast was subject to qualifications and uncertainties for which the Commission made liberal allowance in its ultimate allocation, nevertheless it did not represent sheer conjecture; and it was a matter of mathematical computation to show that, if actually realized, the forecast earnings would have discharged the arrears of preferred dividends in fifteen years. Thereupon the common stockholders would have been entitled to a 100% interest in $2,585,000 of prospective earnings in excess of the annual dividend preference of the preferred. In holding that the common stockholders of the company were entitled to receive approximately a 5% interest in the distribution of its assets the Commission accorded them a present interest on a parity with the old preferred stockholders of approximately $309,000 in the same assumed prospective earnings. This involved, as was noted by the Court of Appeals for the Third Circuit, the implicit application of a very high discount rate to reflect the risk that the forecast earnings might not be realized.

> * * * But for the element of risk the relationship between the future interests surrendered and the present interests to be received under the plan may be compared to the difference between an annuity of $8.40 beginning fifteen years hence and an annuity of $1 a year beginning immediately. To make these annuities mathematically equivalent, the annuity of $8.40 a year would be subjected to discount to present value at the rate of $15.2% a year.

"Thus, as the Commission points out, 15.2% measures the risk factor upon which the Commission based the assumption that the common stock might receive an estimated $2,585,000 a year beginning fifteen years in the future. This is a very high discount rate and expresses adequately the risk inherent in the expectation that the Commission's earnings estimate will be realized. In employing this high measure of risk factor the Commission offsets its very liberal estimate of $6,185,000 of consolidated earnings." See *In re Securities and Exchange Commission,* 142 F. 2d 411, 421 (C. A. 3, 1944).

The earnings forecast employed by the Commission in the *Otis* case was subject to many uncertainties recognized by the majority of the Commission and emphasized by the dissenting Commissioner including the fact that it was an estimate of consolidated earnings, part of which presumably would be retained in the operating companies to help finance needs for additional plant and would not be available for dividends by the parent holding company. Nevertheless, the figure was not a wholly arbitrary assumption unrelated to past and current experience of the holding company system. The forecast used by the Commission coincided with the average of system earnings for the prior six years after adjustment for certain items which the company regarded as non-recurrent. While the validity of these adjustments was a matter of controversy, the earnings for the last twelve months' period then available, even without any such adjustment, exceeded the Commission's forecast. See *In the Matter of United Light and Power Company,* Holding Company Act Release No. 4215, at p. 17. We believe that there is no comparable starting point in reasonably foreseeable earnings which could support a computation of value for the Niagara Hudson warrant holders' privilege of buying the common stock of Niagara Hudson at $42.86 a share.

it would require a disregard of both past experience and anything now foreseeable to forecast future earnings high enough to support a value for the common stock equal to $42.86 a share.

Moreover, there is a fundamental distinction between the contract rights of the United Light and Power common stockholders, vis-a-vis the preferred, dealt with in the *Otis* case, and the contract rights of the Niagara Hudson warrant holders, vis-a-vis its stockholders. But for the impact of the Holding Company Act, the United Light and Power stockholders were entitled to have all earnings applied to the discharge of the preferred stockholders' prior claim and the consequent building up of their own equity. The Niagara Hudson warrant holders, on the other hand, have no contract right to require Niagara Hudson's earnings to be applied to improve the value of the common stock subject to their option, since the option contract expressly reserves to the company the right to capitalize retained earnings by declaration of stock dividends in which the warrant holders would have no interest unless they exercised their subscription right prior to the payment of such stock dividends.

We append hereto the text of the warrant contract.* It will be noted that the contract specifies, *inter alia*, the right to purchase Niagara Hudson common stock at $42.86 a share "without limit of time". This right is not only conditioned upon the continuation of the company but is expressly made applicable to the common stock of the company "as such stock may be constituted at the time of purchase * * * whether or not the rights or interests represented by such shares are equivalent to the rights or interests represented by the shares of common stock

* The pertinent terms of the warrant contract appear at pages 36-37 of the Certificate of Consolidation forming Niagara Hudson Power Corporation dated February 1, 1937 (Niagara Hudson's Exhibit 37). For the convenience of the Court, we annex the actual text of the warrant contract, which is a matter of official record as part of the Niagara Hudson's registration statement under Section 5(b) of the Act.

of the corporation authorized or outstanding at the date hereof or at any other time prior to such purchase and irrespective of any change * * * by way of payment of stock dividends, sale, exchange or other disposition of any class of stock of the corporation." The contingent character of the interest in Niagara Hudson created by the contract is emphasized by the further language "this option warrant does not entitle the holder hereof to any rights whatsoever as a stockholder of the corporation."

We submit that there is nothing in the nature of the warrant contract nor any "reasonably foreseeable" indicia of earning power which would permit the Commission to find a positive intrinsic value for the warrants, without making its valuation process so completely arbitrary and conjectural as to undermine the principle of strict priority which both the *Otis* case and the subsequent *Engineers* case reaffirm as applicable in Holding Company Act reorganizations. See *Otis & Co.* v. *SEC*, 323 U. S. 624, 634; *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 130-131.

3. There remains the question of market value. The market history relied upon by the Court derives from a table which the Commission appends to its own opinion. See Holding Company Act Release No. 9270, page 35, Appendix F. For that reason, we do not believe that a remand merely for the purpose of having the Commission consider the market history, as suggested in the concurring opinion, would serve any useful purpose. We believe that the Commission has considered that market history in the sense of being fully aware that the warrants have been bought and sold at the prices indicated. The Commission opinion in the *Commonwealth and Southern* case, Holding Company Act Release No. 8633, at page 38, shows a similar recognition of the market history of the

warrants involved in that case. It may be noted that that case has been argued before the Court of Appeals for the Third Circuit and the present appellant as the appellant in that case makes a similar argument, again stressing the market history of the warrants.

The majority opinion treats the market history of the warrants as evidence of value to which the Commission is apparently required to give weight. We do not dispute for present purposes, since the Commission has made no finding as to this, the Court's inference from the market history that the warrants would today have a realizable *market* value in excess of zero, if Niagara Hudson were to continue with its pre-plan structure and with the warrants outstanding.

Assuming such a market value could be susceptible of estimation by the Commission on remand, we believe it contrary to all reorganization precedents to treat such a market value as the determinant of what the warrant holders are entitled to receive. We believe that the only valid test is the intrinsic value of the warrants. As was suggested from the bench in the course of argument, it is not uncommon to deny participation in a reorganization to junior securities having no intrinsic value deducible from analysis of prospective earning power, despite the fact that such securities have been quoted in the market. For instances in which security holders have been denied participation in reorganized enterprises despite the presence of market values, see *Re United Gas Corporation*, 58 F. Supp. 501 (option warrants); *Re Standard Gas & Electric Company*, 59 F. Supp. 274, reversed on other ground, 151 F. 2d 326, *cert. denied*, 327 U. S. 796 (common stock); *Re Central States Utilities Corp.*, 74 F. Supp. 360 (preferred stock); *Re American & Foreign Power Co.*, 80 F. Supp. 514 (option warrants);

Group of Institutional Investors v. *Milwaukee R. R. Co.*, 318 U. S. 523 (preferred and common stock).

The possibility that securities might be "issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and * * * in anticipation of excessive revenues from subsidiary public utility companies" was expressly envisaged by the Congress and is adverted to as one of the evils which the Act was intended to eliminate. See Section 1(b)(1). While the legislative history reviewed in the *Otis* case indicated an intention on the part of the Congress that the Commission should preserve in reorganization all legitimate investment values, there is no indication of intention to preserve wholly irrational values based upon nothing more than speculation in the market places. See *Otis & Co.* v. *SEC*, 323 U. S. 624, 636.

If the Commission properly concluded that there was no rational process by which it could find an intrinsic value for the warrants at any given amount, it would seem to follow that whatever valuation might have been put on the warrants by stock market traders would not reflect a rational valuation process on their part. We do not see how the Commission could with any greater propriety accept an irrational judgment of the market place than to undertake to rest its own valuation upon non-rational grounds.

In characterizing as irrational the market quotations upon which the Court relies, we do not wish to suggest that those who traded in the warrants may not have had a perfectly rational expectation of profit from their trading activities. What we do mean is that lacking any rational basis for appraising the remote chance that the warrant price could ever be worth exercising, purchases of the warrants necessarily represented primarily the ebb

and flow of irrational hope on the part of the naive and uninformed, or represented the traders' expectation of being able to profit from anticipation of market trends.

The Court's opinion intimates that the Commission in this case, as in the *Electric Power & Light Company* case, was free to eliminate that portion of the market's valuation which would derive from the greater speculative possibilities provided by a given amount of capital used to purchase warrants rather than common stock. The Court characterized this as a "nebulous factor" and we agree that it is. However, we believe the Court's opinion fails to recognize that any value which the market might attribute to the warrants in this case is just as irrelevant as the factors held to have been properly disregarded by the Commission in the *Electric Power and Light Company* case.

4. Apart from its novelty, the requirement that the Commission defer to market judgment in its reconsideration of the value of the warrants raises great difficulties of administration. If the market judgment is intended to be controlling, it amounts to a complete displacement of the Commission's statutory responsibility. If the Commission is expected to arrive at some compromise between its own judgment of intrinsic value and whatever might be taken as the equivalent of market value, then the opinion gives no guide as to the respective weights to be given to each of these divergent factors.

The concluding paragraph of the opinion suggests that the Court because "forced to deal in prophecies" has formed its own judgment contrary to that of the Commission concerning the intrinsic value of the warrants, namely, that they represent an appreciable chance of having an exercise value and that their present value so

appraised is susceptible of being transmuted into a dollars and cents valuation without reference to the market. On this interpretation, reference to the market history is merely by way of confirmation of the Court's disagreement with the Commission's zero valuation. But a mere indication of disagreement with the Commission's conclusion of no value, without prescribing a new standard to control its action on remand, leaves no prospect that a second "honest guess" by the Commission is likely to coincide with the Court's views.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission,
425 Second Street, N.W.,
Washington 25, D. C.

February 15, 1950.

Certificate of Counsel

The undersigned, counsel of record for the appellee, the Securities and Exchange Commission, in the above case, hereby certifies that the foregoing petition is not made for the purpose of delay and is well founded in law.

Roger S. Foster,
General Counsel,
Securities and Exchange Commission,
425 Second Street, N.W.,
Washington 25, D. C.

February 15, 1950.

APPENDIX

No. KBC
1937

Option Warrant to
Purchase 100 Shares
At $50. For Each 1-1/6 Shares
(i. e., $42.85 5/7 per share)

CLASS B

OPTION WARRANT TO PURCHASE COMMON STOCK OF

NIAGARA HUDSON POWER CORPORATION
(CONSOLIDATED CORPORATION)

Incorporated under the Laws of the State of New York as Provided in the Certificate of Consolidation Forming Niagara Hudson Power Corporation.

Scrip May be Issued in Lieu of Any Fractional Shares of Stock of the Corporation.

THIS IS TO CERTIFY that _____ is entitled to purchase at any time (without limit) all or any part of

ONE HUNDRED

full-paid and non-assessable shares of the Common Stock of NIAGARA HUDSON POWER CORPORATION, a corporation of the State of New York (hereinafter called the Corporation), as its Common Stock may be constituted at the time of purchase, at a price of $50. for each one and one-sixth shares (i. e., $42.85 5/7 per share) and to receive a certificate for the shares of Common Stock so purchased upon presentation and surrender of this Class B Option Warrant duly endorsed and upon payment of the purchase price at the office or agency of the Corporation in the Borough of Manhattan, City of New York.

This Class B Option Warrant is issued pursuant to paragraph (4) of Section B of Article Ninth of the Certificate of Consolidation effecting the consolidation of

Niagara Hudson Power Corporation (constituent corporation) and Mohawk Hudson Power Corporation to form Niagara Hudson Power Corporation (consolidated corporation) and is issued in exchange for option warrants of Niagara Hudson Power Corporation (constituent corporation) or of Mohawk Hudson Power Corporation, as the case may be, as provided in said Certificate of Consolidation, for the purpose of preserving and continuing, as nearly as may be, the rights of the holders of said option warrants, existing at the date of consolidation, according to their respective terms.

It is expressly understood that the shares of Common Stock of the Corporation subject to being purchased hereunder are shares of the Common Stock of the Corporation as such stock may be constituted at the time of purchase, and that delivery of the number of shares of such stock called for hereunder shall be good delivery hereunder whether or not the rights or interests represented by such shares are equivalent to the rights or interests represented by the shares of Common Stock of the Corporation authorized and outstanding at the date hereof or at any other time prior to such purchase and irrespective of any change which may have occurred prior to the exercise hereof, including (without prejudice to the generality of the foregoing) any change by way of payment of stock dividends, sale, exchange or other disposition of any class of stock of the Corporation, any change of authorized capital stock or reclassification thereof, the sale or lease by the Corporation of all or substantially all or any part of its property or any change whatsoever, provided, however, that if, while this Class B Option Warrant is in effect, the shares of such Common Stock which the holder hereof may be entitled to purchase in accordance with the provisions hereof shall be subdivided or consolidated into a greater or lesser number of shares of Common Stock of the Corporation by the exchange of outstanding shares of Common Stock of the Corporation for a different number of shares of Common Stock of the Corporation, or if, upon a merger or consolidation, the shares of such Common

Stock of the Corporation shall be exchanged for shares of common stock of the corporation resulting from such merger or consolidation, then the holder hereof shall be entitled to purchase the new shares of Common Stock of the Corporation or the shares of common stock of the corporation resulting from such merger or consolidation which were exchangeable for the shares of Common Stock of the Corporation which the holder hereof would have been entitled to purchase except for such action. Whenever in this Class B Option Warrant the Corporation is referred to, it shall be deemed to include any corporation into which the Corporation may be merged or consolidated.

This Class B Option Warrant does not entitle the holder hereof to any rights whatsoever as a stockholder of the Corporation.

This Class B Option Warrant is exchangeable at the option of the registered holder at the office or agency of the Corporation in the Borough of Manhattan, City of New York, for other Class B Option Warrants of different denominations entitling the holder thereof to purchase an equal aggregate number of shares of the Common Stock of the Corporation as specified in this Class B Option Warrant. This Class B Option Warrant is transferable by the holder hereof in person or by his duly authorized attorney on the books of the Corporation in the Borough of Manhattan, City of New York, upon surrender of this Class B Option Warrant properly endorsed.

Title hereto is transferable with the same effect as in the case of a negotiable instrument and may be transferred by delivery hereof by any person in possession of the same, however such possession may have been acquired, if properly endorsed in blank, or if properly endorsed to a specified person, by delivery hereof to such person; and the Corporation may treat the record holder hereof for the time being (or when presented properly endorsed to a specified person, the person to whom endorsed, or, when presented properly endorsed in blank, the bearer hereof) as the absolute owner hereof for all purposes and shall not be affected by any notice to the contrary; to all of which

every taker and holder hereof, by the acceptance hereof, agrees with every subsequent taker and holder hereof as well as with the Corporation.

This Class B Option Warrant shall not be valid until countersigned by the Transfer Agent and registered by the Registrar.

WITNESS the facsimile seal of the Corporation and the facsimile signatures of its duly authorized officers.

Dated:

NIAGARA HUDSON POWER CORPORATION,

President.

Secretary.

[CORPORATE SEAL]

United States Court of Appeals

FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION and NIAGARA HUDSON POWER CORPORATION,

Appellees,

v.

M. LEVENTRITT,

Appellant.

Docket No. 21566.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

PETITION OF APPELLEE, NIAGARA HUDSON POWER CORPORATION, FOR REHEARING

HORACE R. LAMB,
Attorney for Appellee,
Niagara Hudson Power Corporation,
15 Broad Street,
New York 5, New York.

February 15, 1950.

United States Court of Appeals

FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION and NIAGARA HUDSON POWER CORPORATION, *Appellees,* v. M. LEVENTRITT, *Appellant.*	Docket No. 21560.

Before: L. HAND, SWAN and CLARK, Circuit Judges.

PETITION OF APPELLEE, NIAGARA HUDSON POWER CORPORATION, FOR REHEARING OF THIS APPEAL

Appellee, Niagara Hudson Power Corporation, respectfully joins in the petition of appellee, Securities and Exchange Commission, for a rehearing of this appeal upon the grounds stated in the separate petition of the Commission.

Dated, February 15, 1950.

Respectfully submitted,

HORACE R. LAMB,
Attorney for Appellee,
Niagara Hudson Power Corporation,
15 Broad Street,
New York 5, New York.

Certificate of Counsel

The undersigned, counsel for appellee, Niagara Hudson Power Corporation, hereby certifies that the foregoing petition for rehearing of this appeal is not made for the purpose of delay and is well founded in law.

Dated, February 15, 1950.

HORACE R. LAMB,
Attorney for Appellee,
Niagara Hudson Power Corporation,
15 Broad Street,
New York 5, New York.

[fol. 96] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, and NIAGARA HUDSON POWER CORPORATION, Appellees,

v.

M. LEVENTRITT, Appellant

Before L. Hand, Swan and Clark, Circuit Judges

OPINION ON PETITIONS FOR REHEARING—Filed February 23, 1950

Roger S. Foster, for Securities and Exchange Commission.
Horace R. Lamb, for Niagara Hudson Power Commission.

Per CURIAM:

Petitions for rehearing denied.

L. H., T. W. S., C. JJ.

I dissent and vote to grant.

C. E. C., C. J.

[fol. 97] [File endorsement omitted.]

[fol. 98] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITIONS FOR REHEARING—Filed February 23, 1950

Petitions for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petitions be and hereby are denied.

Alexander M. Bell, Clerk.

[fol. 99] [File endorsement omitted.]

[fol. 100] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 101] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION

It Is Hereby Stipulated and Agreed, by and between counsel for the Petitioner and M. Victor Leventritt, Pro Se, the Respondent herein, that there may be omitted from the printed record for the use of the Supreme Court of the United States in this proceeding the following documents appearing at the pages noted in the certified transcript of record in the United States Court of Appeals for the Second Circuit:

Docket entries ..... Page 1
Designation ..... Page 34
Clerk's Certificate ..... Page 37
Motion to clarify and amend Decision and Judgment ..... Page 49
Endorsement ..... Page 55
Affidavit in opposition to motion ..... Page 56
Memorandum of Appellee, Niagara Hudson Power Corp. in reply to affidavit of Appellant in opposition to motion to clarify, etc. ..... Page 62
[fol. 102] Statement of Securities and Exchange Commission ..... Page 72

Horace R. Lamb, Craigh Leonard, Counsel for Petitioner, 15 Broad Street, New York 5, N. Y.; M. Victor Leventritt, Pro Se, 30 Broad Street, New York, N. Y.; Philip B. Perlman, Solicitor General; Roger S. Foster, General Counsel, Securities and Exchange Commission.

[fol. 153] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. —

NIAGARA HUDSON POWER CORPORATION, Petitioner

vs.

M. VICTOR LEVENTRITT

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including July 22, 1950.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 18 day of May, 1950.

[fol. 154] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. —

SECURITIES AND EXCHANGE COMMISSION, Petitioner,

vs.

M. VICTOR LEVENTRITT

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including July 22, 1950.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 18 day of May, 1950.

[fol.155] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 211

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 156] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 212

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
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FILED
JUL 20 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 211

NIAGARA HUDSON POWER CORPORATION,
Petitioner,

v.

M. VICTOR LEVENTRITT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
15 Broad Street,
New York, N. Y.,
Counsel for Petitioner.

July 20, 1950.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
The Question Presented	2
Statutes Involved	3
Statement	3
Specification of Errors to be Urged	7
Reasons for Granting Writ	7
Argument	9
Conclusion	13
Appendix	15

Citations

Cases:

In re American & Foreign Power Co., 80 F. Supp. 514	11
In re Central States Power & Light Corporation, 74 F. Supp. 360	11
Group of Institutional Investors v. *Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523	11
National Labor Relations Board v. *Link-Belt Company*, 311 U. S. 584	11

PAGE

Opp Cotton Mills v. *Administrator*, 312 U. S. 126 11

Otis & Co. v. *Securities and Exchange Commission*, 323 U. S. 624 ..... 8, 9

Securities and Exchange Commission v. *Central-Illinois Securities Corp.*, 338 U. S. 96 ..... 8, 10

South Chicago Company v. *Bassett*, 309 U. S. 251 11

Wilmington Trust Co. v. *Helvering*, 316 U. S. 164 11

In re United Gas Corporation, 58 F. Supp. 501, aff'd 162 F. 2d 469 11

Statutes:

Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U.S.C. §79 *et seq.*:

Sec. 11(b)(2) (15 U.S.C. §79k(b)) 3
Sec. 11(e) (15 U.S.C. §79k(e)) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. ——

NIAGARA HUDSON POWER CORPORATION,
Petitioner,

v.

M. VICTOR LEVENTRITT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Niagara Hudson Power Corporation, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on February 1, 1950.

Opinions Below

The findings and opinion of the Securities and Exchange Commission are Exhibit D to the application of the Securities and Exchange Commission for enforcement of its order to be found at R. 48-96. The opinion of the

United States District Court, Northern District of New York, appears at R. 107-112 and 86 F. Supp. 697. The opinion of the Court of Appeals (R. 122-127) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 1, 1950. Petitioner made a motion to clarify and amend the opinion and judgment of the court which was granted and, upon reconsideration, the judgment was amended by order filed February 14, 1950 (R. 122). Thereupon, petitioner and the Securities and Exchange Commission moved for a rehearing which was denied by order filed February 23, 1950 (R. 151). By order of this Court entered May 18, 1950, the time in which petitioner might file a petition for a writ of certiorari was extended to July 22, 1950. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (62 Stat. 928, 28 U.S.C. 1254).

The Question Presented

Where, in connection with a reorganization and liquidation of a public utility holding company, the Securities and Exchange Commission has found that, under the "fair and equitable" standard of Section 11 of the Public Utility Holding Company Act, no participation should be given to warrants of the holding company to buy its stock at a price greatly in excess of the present value of the stock and greatly in excess of any rational forecast of the future value of such stock, may the Court of Appeals require participation in the reorganization for such warrants solely because the warrants were previously traded in the market at some value?

Statutes Involved

The pertinent provisions of Sections 11(b) and 11(e) of the Public Utility Holding Company Act of 1935 are set forth in Appendix A, *infra*, pages 15 to 17.

Statement

Petitioner, Niagara Hudson Power Corporation (Niagara Hudson), is a registered holding company under the Public Utility Holding Company Act of 1935 (the Act). In 1942, the Securities and Exchange Commission (the Commission) instituted proceedings, under Section 11(b) (2) of the Act, looking to the simplification of the Niagara Hudson System and the dissolution of Niagara Hudson as a public utility holding company. After certain steps had been taken to effect a simplification of the Niagara Hudson System, Niagara Hudson, with the approval of the Commission, in May 1948, filed a plan pursuant to Section 11(e) of the Act (the Consolidation Plan), providing for the consolidation of its three principal subsidiaries into a single electric and gas utility company (the New Operating Company). In December 1948, Niagara Hudson filed a second plan pursuant to Section 11(e) of the Act, which was conditioned upon consummation of the Consolidation Plan and which provided for the ultimate dissolution of Niagara Hudson (the Dissolution Plan).

At the times of filing of the plans, Niagara Hudson had outstanding two classes of preferred stock and 9,580,988½ shares of common stock, $1.00 par value. It also had outstanding Class B stock option warrants (the warrants) entitling the holders thereof to purchase at any time 497,191⅚ shares of common stock, each warrant entitling the holder to purchase 1⅙ shares of common

stock upon payment of $50.00 or, in other words, entitling the holder to a call on the common shares at $42.86 a share. The Dissolution Plan called for the exchange of all the outstanding preferred stock of Niagara Hudson for Class A convertible stock of the New Operating Company to be formed in accordance with the Consolidation Plan, and for the exchange of all the common stock of Niagara Hudson for common stock of such New Operating Company under certain terms and conditions stated in the plan. The Dissolution Plan provided that following the completion of all such exchanges, the payment of Niagara Hudson's outstanding bank loans and certain other necessary corporate action, Niagara Hudson would be dissolved. No provision was made in the Dissolution Plan for the outstanding warrants, and the rights of the warrant holders were to be terminated as of the effective date of the plans.

The proceedings with respect to both plans were consolidated, and after hearings, the filing of briefs and oral argument, the Commission on August 16, 1949 issued its findings and opinion approving, with certain modifications which were thereafter made (R. 97-102), both plans as necessary to effectuate the provisions of Section 11(b) of the Act and as fair and equitable to the persons affected by the plans.

In considering the fairness of the plans the Commission reviewed the earnings and operations of Niagara Hudson for the years 1937 to 1948 and considered the forecasts of future earnings and probable dividends submitted by expert witnesses and company officials. It then considered, separately, the treatment accorded by the plans to the holders of the preferred stocks of the three subsidiary companies which were to be consolidated pursuant to the Consolidation Plan, and the treatment

accorded to the holders of each class of the outstanding securities of Niagara Hudson.

With respect to the treatment to be accorded to the holders of the Class B stock option warrants of Niagara Hudson, the Commission found (R. 82):

> "Under the plans, no provision is made for participation of the Class B stock option warrants of Niagara Hudson and all rights represented by such warrants will terminate upon the dissolution of that company.
>
> The option warrants entitle their holders to purchase at any time 497,191⅜ shares of Niagara Hudson common stock, each warrant entitling the holder to 1⅛ shares upon payment of $50. This is equivalent to an exercise price of $42.86 for one share. Since 1932, the Niagara Hudson or predecessor company common stock has never sold at a price higher than 18¼ and has sold as low as ⅞. During the same period, the option warrants have never sold higher than 5 and have been as low as ⅛. In 1948, the prices for the option warrants ranged from a high of 1 to a low of ⅛, and in 1949, from a high of ¼ to a low of ⅛.
>
> In considering the participation to which option warrant holders may be entitled, the test is basically the same as that applied with respect to the other types of securities, that is, what value, if any, is being given up by the surrender of the rights attaching to that security. The price of $42.86, which a holder of an option warrant would have to pay for one share of Niagara Hudson common stock, is more than 30 times the estimate we have used of $1.39 as foreseeable earnings which would be applicable to that stock on the basis of present investment if Niagara Hudson were to continue. That price is about 3.5 times the recent high market prices for the Niagara Hudson common stock of around 12 per share.

If we were to assume that Niagara Hudson were to continue and its common stock were to sell in the future at a ratio of 15 times consolidated earnings, which would appear to be a very liberal assumption, it would require per share earnings of $2.86 to result in a price of $42.86 per share. Such earnings would represent an increase of 106% over the approximately $1.39 of earnings which we have found attributable to the present investment. On the basis of the more likely assumption that the price-earnings ratio at which the Niagara Hudson common stock would sell would be something less than 15 times, an even greater increase in earnings would be required to attain a per share price of $42.86.

Under all the circumstances, we cannot find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future. Accordingly, we find that such option warrants have no recognizable value[39] and that the plans satisfy the standard of fairness and equity with respect to such option warrants in excluding them from any participation in the reorganization of Niagara Hudson."

"[39] We recognize that the holders of the option warrants have a right to purchase common stock at any time, and that this perpetual feature has some present value no matter how remote or speculative the exercise of the right might be. The value to be accorded that right, however, in this case, is so small that as a practical matter we would not be justified in recognizing it for the purposes of a Section 11 reorganization. *Cf. Electric Power & Light Corporation*, —— S.E.C. —— (1949), Holding Company Act Release No. 8889."

Application was thereafter made by the Commission to the United States District Court for the Northern District of New York to enforce and carry out the terms and provisions of the plans and, after hearing, an "Order Enforcing Plans" was entered on November 4, 1949.

Respondent appealed to the United States Court of Appeals for the Second Circuit, which reversed that part of the order of the District Court which enforced the provisions of the Dissolution Plan relating to the warrants and remanded the proceedings to the Commission for further action in accordance with the court's opinion, which in effect required that consideration must be given by the Commission to evidence of the past market value of the warrants.

Specification of Errors To Be Urged

The Court of Appeals erred:

(1) In holding that the evidence of past earnings and a forecast of future earnings, upon which the Commission relied in arriving at its valuation of the warrants, was not substantial evidence within the meaning of the Act.

(2) In holding that the evidence of past market value of the warrants requires the Commission to ascribe some value to the warrants in a Section 11 reorganization.

(3) In substituting its evaluation of the weight to be given to the evidence of past market value for that of the Commission, and in substituting its judgment of the inferences to be drawn from the history of past trading in the warrants for that of the Commission.

(4) In failing to affirm *in toto* the order of the District Court enforcing the plans.

Reasons for Granting Writ

This is a case of great importance because the effect of the decision of the court below is to require the Commission, in making valuations in reorganization proceed-

ings, to be guided by market value rather than the intrinsic value which it has a statutory duty to determine. We urge that the writ be granted for the following reasons:

A. The Commission's determination that the warrants have no recognizable value for the purpose of a Section 11 reorganization is based upon competent evidence that the exercise price of such warrants is substantially in excess of the present value of the stock purchasable upon exercise of the warrants, and substantially in excess of any rational forecast as to the future value of such stock in the light of foreseeable earnings. The court below has rejected the Commission's valuation and substituted its own judgment that because the warrants were traded in the open market, some value must be ascribed to them. The court below has thus decided a question of importance relating to the construction of the Public Utility Holding Company Act of 1935 without giving proper effect to the applicable decisions of this Court, *inter alia, Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.,* 338 U. S. 96.

B. In rejecting the evidence of foreseeable future earnings and relying upon evidence of market value only, the court below has departed from the valuation standards approved by this Court in all reorganization proceedings and has ignored the statutory edict that the findings of the Commission shall be final if supported by substantial evidence. The court below has, therefore, decided a federal question in a way in conflict with the applicable decisions of this Court.

Argument

In arriving at its conclusion that the warrants had no recognizable value and that the Plan met the "fair and equitable" standard provided by the Act, even though no provision is made for participation by the holders of the warrants, the Commission considered, as indicated by its findings and opinion, among others, all of the following factors: (1) The exercise price, $42.86. (2) The market price range of the common stock of Niagara Hudson and its predecessor company since 1932, 18¼ to ⅞. (3) The market price range of the warrants for the same period, 5 to ⅛. (4) The foreseeable earnings applicable to the stock of Niagara Hudson if it were to continue, $1.39 per annum. (5) The earnings that would be required to result in a price of $42.86 per share if Niagara Hudson were to continue, and its common stock to sell at a ratio of fifteen times consolidated earnings, $2.86.

The court below, however, stated in its opinion that it could not agree that there was any evidence, substantial or insubstantial, to support the findings that the warrants were wholly worthless. It is obvious, therefore, that the court below has rejected the validity of both past earnings and a forecast of future earnings as a standard of valuation in reorganization proceedings. This conclusion is in direct conflict with the decision of this Court in *Otis & Co.* v. *Securities and Exchange Commission, supra*, where the Commission's valuation of the relative rights to participate in a public utility holding company reorganization were sustained although premised entirely upon the Commission's estimate of future earnings.

Since it must be conceded that there was *some* evidence to sustain the Commission's valuation finding, it remains only to consider whether the scope of judicial review

would permit the court below to reject the evidence upon which the Commission acted, and substitute its own judgment based upon the evidence of past market value. We submit that the decision of the court below quite evidently violates the substantial evidence rule and exceeds the proper scope of judicial review.

The Court has recently defined the degree of finality which must be accredited to administrative findings as to valuation in *Securities and Exchange Commission* v. *Central-Illinois Securities Corp., supra.* There Mr. Justice Rutledge said (p. 126):

> "Administrative finality is not, of course, applicable only to agency findings of 'fact' in the narrow, literal sense. The Commission's findings as to valuation, which are based upon judgment and prediction, as well as upon 'facts,' like the valuation findings of the Interstate Commerce Commission in reorganizations under §77 of the Bankruptcy Act, * * * are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards.'"

The Commission's findings here were based upon the facts of past earnings and past market values of the Niagara Hudson stock. They were based also upon the Commission's prediction as to future earnings and future market values for such stock. The ultimate conclusion that the warrants were without recognizable value represented the Commission's judgment based upon such facts and prediction. The Commission's valuation is, therefore, not subject to reexamination by a court.

The decision of the court below would seem to indicate that evidence is to be regarded as "substantial" only if there is no conflicting evidence. This proposition is clearly

untenable and at variance with numerous expressions by this Court to the effect that questions as to the weight to be given to evidence or as to inferences to be drawn therefrom are to be resolved by the administrative agency and not by the reviewing court. *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584; *South Chicago Company* v. *Bassett*, 309 U. S. 251.

Even if market value were an acceptable criterion of valuation, therefore, the Commission, under the substantial evidence rule, would not be required to rely upon it, if in the Commission's opinion the other evidentiary factors outweighed the evidence of market value in determining intrinsic value. Intrinsic value rather than market value, moreover, has been uniformly adopted by this and lower courts as a valuation standard in reorganization proceedings. See *Group of Institutional Investors* v. *Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523; *In re American & Foreign Power Co.*, 80 F. Supp. 514; *In re Central States Power & Light Corporation*, 74 F. Supp. 360; *In re United Gas Corporation*, 58 F. Supp. 501, aff'd 162 F. 2d 409.

Furthermore, it is clear that if the Commission were required to be guided by market value, as the court below suggests, then the whole statutory purpose of leaving to the Commission the determination of what valuations are fair and equitable to the security holders involved in a reorganization would be defeated. Valuations would thus become a mere reflection of the aleatory and speculative judgments of traders in the market place rather than, as Congress intended, the considered deliberations of an expert administrative agency.

Finally, it should be noted that even though the warrants are described by the respondent as "perpetual",

actually the right of exercise exists only so long as Niagara Hudson Power Corporation as a corporate entity continues in existence. Since the Commission's order contemplates the dissolution of Niagara Hudson within approximately one year from the effective date of the plans, in early 1951, it is apparent that the discrepancy between the existing market value of Niagara Hudson stock and the exercise price of the warrants is too great to justify any value at all being ascribed to the warrants.

The court below has erred in rejecting the evidence of past earnings and a forecast of future earnings as a standard of valuation. It has erred in relying solely upon market value as such a standard. It has erred in usurping the function of the administrative agency by substituting its judgment for that of the agency where there is substantial evidence of absence of intrinsic value to support the agency's findings. It is thus of great importance that this Court should consider the issues raised in this proceeding, so that the Commission may continue to exercise its proper statutory powers in reorganization proceedings under the Public Utility Holding Company Act of 1935.

The decision below was rendered by a divided court, Judge Clark concurring in result only to the extent that the decision might be construed as remanding the cause back to the Commission to give further consideration to the market history. Upon application for rehearing (which showed that the Commission had considered and rejected that history) this same Judge dissented from the court's decision denying rehearing.

It is submitted that under the circumstances here present a remand to the Commission will be completely futile. The Commission has already considered all the evidence that is available as to the value of the warrants. In accordance with the decisions of this Court it has based

its conclusion upon evidence of past earnings and a forecast of future earnings. On the other hand, in the exercise of its expert administrative discretion and in reliance upon decisions of this and other courts it rejected the evidence of market value as determinative of intrinsic value in this reorganization proceeding.

Since the Commission has already considered all the available evidence, it could hardly arrive at a different conclusion upon remand. If it were to follow the directions in the opinion below and arrive at a different conclusion by reason of the past market value of the warrants, the consequence is to rob the Commission of its statutory duty to make expert valuations and to substitute therefor the judgment of the Court—a clear usurpation of the statutory functions of the Commission.

CONCLUSION

For the reasons stated it is respectfully requested that the Writ of Certiorari be issued.

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
Counsel for Petitioner.

July 20, 1950.

APPENDIX A

Excerpts from Section 11 of the Public Utility Holding Company Act of 1935

"Sec. 11

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * * * * * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

Appendix A

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * * * * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such

extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

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No. 212

In the Supreme Court of the United States

OCTOBER TERM, 1950

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

M. VICTOR LEVENTRITT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Opinions below	2
Jurisdiction	2
Statute involved	3
Question presented	3
Statement	4
Reasons for granting the writ	10
Conclusion	22

CITATIONS

Cases:

American & Foreign Power Co., Holding Company Act Release Nos. 7815, 7849 (1947), enforced and affirmed, 80 F. Supp. 514	11
Case v. *Los Angeles Lumber Co.*, 308 U. S. 106	13, 20
Central States Power & Light Corp., In re, 74 F. Supp. 360	18
Commonwealth & Southern Corp., In re, 84 F. Supp. 809	11, 18
Community Gas & Power Co., In re, 168 F. 2d 740 certiorari denied, 334 U. S. 846	15
Community Gas & Power Co., Holding Company Act Release No. 6436 (1946)	17
Consolidated Rock Products Co. v. *DuBois*, 312 U. S. 510	15
Ecker v. *Western Pacific R. Corp.*, 318 U. S. 448	15
Electric Power & Light Corp., In re, 176 F. 2d 687	15, 17
Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523	15
Lahti v. *New England Power Association*, 160 F. 2d 845	15
New York Trust Co. v. *SEC*, 131 F. 2d 274, certiorari denied, 318 U. S. 786	13
Niagara Hudson Power Coproration, Holding Company Act Release No. 5155 (1944)	5
Niagara Hudson Power Corporation, Holding Company Act Release Nos. 6083, 6108 (1945), affirmed, *Phillips* v. *SEC*, 156 F. 2d 606	5
Otis & Co. v. *SEC*, 323 U. S. 624	12, 13, 15, 17, 18
Phillips v. *SEC*, 156 F. 2d 606	5
SEC v. *Central-Illinois Securities Corp.*, 338 U. S. 96	13, 15, 21
Standard Gas & Electric Co., In re, 59 F. Supp. 274, reversed on other grounds, 151 F. 2d 326, certiorari denied, 327 U. S. 796	17

Cases—Continued

	Page
United Gas Corp., In re, 58 F. Supp. 501	18
United Light & Power Co., Holding Company Act Release No. 4215	16

Statutes:

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a:

Section 1(b)(1)	10
Section 11(b)(2)	5
Section 11(e)	1, 3, 4, 5, 11, 15

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

M. VICTOR LEVENTRITT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 1, 1950, reversing part of an order, dated November 4, 1949, of the United States District Court for the Northern District of New York. The order of the district court approved and enforced amended plans of reorganization pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15

U. S. C. § 79k (e)), with respect to Niagara Hudson Power Corporation and subsidiaries, which plans had previously been approved by the Commission.

OPINIONS BELOW

The amended opinion of the Court of Appeals (R. 122-126, 128) is reported in 179 F. 2d 615. The opinion of the district court (R. 107-112) is reported in 86 F. Supp. 697. The findings and opinion of the Commission, dated August 16, 1949, and its order dated August 25, 1949, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release Nos. 9270, 9295 (R. 48-95, 103-104).

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1950 (R. 128), and was amended by order of February 14, 1950 (R. 128-129). Petitions for rehearing were denied by the Court of Appeals on February 23, 1950, one judge dissenting (R. 151). On May 18, 1950, Mr. Justice Jackson extended the time within which this petition might be filed to and including July 22, 1950 (R. 153).[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1254, made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79y).

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[1] The application for extension was made in view of the pendency of a similar case in the Court of Appeals for the Third Circuit. *In the Matter of Commonwealth & Southern Corp.*, No. 10045. No decision in that case has yet been rendered.

STATUTE INVOLVED

Section 11(e) of the Public Utility Holding Company Act of 1935 provides in pertinent part as follows:

> (e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. * * *

QUESTION PRESENTED

Where warrants represent no interest other than an unexercised option to buy stock of a holding

company at a price, found by the Commission on ample evidence to be substantially in excess of the present value of the stock, or of any future value that might rationally be forecast, does the "fair and equitable" standard of Section 11(e) of the Holding Company Act require, as a matter of law, that the holders of such warrants participate in the assets of the company on reorganization, merely because such warrants have been, and might in the future be, traded in the market at some value in excess of zero if the Act did not require termination of the option privilege?

STATEMENT

This case involves one of two plans filed under Section 11(e) of the Public Utility Holding Company Act of 1935 by Niagara Hudson Power Corporation, a registered holding company under the Act. This plan contemplates dissolution of Niagara Hudson. One of the issues before the Commission and the district court, and the principal question dealt with by the opinion of the Court of Appeals, was whether, under the "fair and equitable" standard of Section 11(e), any participation should be accorded to the class B stock option warrants of Niagara Hudson. Aspects of the dissolution not concerned with the warrants are not the subject of controversy.

When the Section 11(e) proceedings were instituted, Niagara Hudson had outstanding the following securities: (1) notes payable to banks in the

amount of $20,000,000; (2) first and second preferred stocks, $100 par value, in the amount of 378,875 and 105,930 shares respectively; (3) 9,580,988½ shares of common stock, $1 par value; (4) class B stock option warrants. These warrants represent options to purchase at any time 497,191-3/6 shares of common stock, each warrant entitling the holder thereof to subscribe to 1-1/6 shares of common stock upon payment of $50, or at the rate of $42.86 per share (R. 52).

Both plans were filed by Niagara Hudson under Section 11(e) for the purpose of complying with the provisions of Section 11(b)(2) 48 Stat. 821 (15 U. S. C. 79k(b)(2)), and the Commission's order and requirements thereunder (R. 54, 58-59).[2] One of the plans, since consummated and not challenged on appeal to the court below, provided for the consolidation into one operating company of Niagara Hudson's three principal operating subsidiaries, all of whose common stocks were owned by Niagara Hudson. This new operating company would issue all of its common stock to Niagara Hudson, while preferred stock would be issued to the preferred stockholders of the constituent companies on a share for share basis and bearing the same dividend rates. The second plan, operative only upon consummation of the first, provided for

[2] *Niagara Hudson Power Corporation*, Holding Company Act Release No. 5155 (1944); *Niagara Hudson Power Corporation*, Holding Company Act Release Nos. 6083, 6108 (1945), affirmed, *Phillips* v. *SEC*, 156 F. 2d 606 (C. A. 2).

the disposition by Niagara Hudson of its common stock interest in the new operating company by exchanging the same for its preferred and common stocks, the transfer of Niagara Hudson's relatively small and miscellaneous assets to the new operating company, and for the subsequent dissolution of Niagara Hudson. No provision was included for participation by the holders of the class B stock option warrants. (R. 54-56.)

In order to effectuate the foregoing exchange, the common stock of the new operating company, issued to Niagara Hudson for its interest in the constituent companies, was reclassified pursuant to the plan into 1,939,220 shares of class A stock and 7,473,172 shares of common stock. The class A stock, having the same voting rights as the common stock but preferred as to dividends of $1.20 per share and subject to specified conversion, redemption and other rights, has been used for the purpose of retiring Niagara Hudson's preferred stocks. The common stock of the new operating company was to be distributed to the common stockholders of Niagara Hudson on the basis of 0.78 shares of common stock for one share of Niagara Hudson common stock plus a graduated cash payment per share to pay off the bank loans. (R. 55-56, 99-100.)[3]

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[3] Under the terms of the bank loan agreement, payment of dividends on the common stock of Niagara Hudson was prohibited so long as any part of the loans was outstanding. Under the plan, common stockholders of Niagara Hudson who

The Commission approved the plan by order, dated August 25, 1949 (R. 103-104). On application of the Commission and after hearing as prescribed in Section 11(e), the United States District Court for the Northern District of New York approved and enforced the plan by order dated November 4, 1949 (R. 1-104, 113-119). Respondent, as owner of 8,000 of the class B stock option warrants, appealed to the court below complaining of the failure to make any provision for the warrant holders. The Commission and the district court had held the plan necessary and appropriate to comply with Section 11(b) in providing for the liquidation of Niagara Hudson and in its consequent termination of the warrant holders' options. The court below agreed that "in the discharge of [its] duty the Commission was free to eliminate such securities as these" (R. 123). But the order of the district court was reversed and the case remanded on the ground that the Commission and the district court had erred in holding that it was "fair and equitable" to deny the warrant holders a participation in the assets of Niagara Hudson.

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wish to exchange their stock for the common stock of the new operating company following January 5, 1950, the effective date of the plan, and to receive dividends thereon immediately, are required to pay in cash their proportionate share of the bank loans. If no cash is tendered, Niagara Hudson is to retain the common stock of the new operating company and use the dividends thereon for the purpose of retiring the bank loans. When the bank loans are paid in full, the new common stock will be distributed to the common stockholders of Niagara Hudson without any cash payment (R. 56, 101).

The Commission's conclusion that the warrant holders were not entitled to participate in the assets was based upon an estimate that if Niagara Hudson were to continue as a going enterprise, the system's consolidated net income reasonably might be expected to average about $15,750,000 per year. After deducting dividend requirements of $2,424,000 on Niagara Hudson's preferred stock, this would leave a net income of $13,326,000 applicable to the common stock of Niagara Hudson, or $1.39 per share on the 9,580,988 shares of Niagara Hudson's common stock. On a liberal estimate of a value for the common stock of Niagara Hudson at 15 times consolidated earnings, it would require earnings of $2.86 per share, or an increase of about 106% over the Commission's forecast of foreseeable earnings, to make the value of this stock approximate the exercise price of $42.86 per share, payment of which the warrant holder was required to make before he would become a stockholder entitled, as such, to participate in the earnings or assets of the enterprise. The Commission concluded that any possibility of such increment beyond its estimate of foreseeable earnings was too remote and speculative and that, accordingly, the warrants had no measurable investment value. The warrant holders were, therefore, allowed no participation in the Section 11(e) reorganization of the Niagara Hudson system. (R. 63-71, 81-82.) The district court, in reviewing the Commission's

findings, reached the same conclusion (R. 112, 116). See also 86 F. Supp. 697, 701.

The court below accepted the Commission's earnings forecast. It agreed that such forecast indicated a value for the common stock equal to about one-third of the exercise price of the warrants. But, it reasoned that a value for the warrants results from "a willingness to pay cash for the chance that the market's judgment as to the future of the property may prove too unfavorable", that, it must be supposed, Congress did not intend to withdraw recognition for such warrants in Holding Company Act reorganizations, that *"Otis* v. *SEC*, 323 U. S. 624, appears to us to have recognized property whose value was quite as speculative as this", and that the market history, including the fact that the warrants sold at more than nominal prices when the stock of Niagara Hudson was quoted at about its current value, showed that the warrants had, as of the date of the plan, some positive value (R. 122-126). It accordingly reversed the order of the district court insofar as it had enforced and affirmed the dissolution plan for Niagara Hudson without allowing any participation to the warrant holders (R. 126, 128-129). With respect to this decision, Judge Clark concurred in the result. He indicated that while there was persuasive evidence in the record to support the Commission's findings, he was disposed in favor of a remand so that the Commission might

consider "the market quotations, now deemed so important" (R. 126-127).

On February 15, 1950, the Commission filed a petition for rehearing, in which petition Niagara Hudson joined. In this petition the Commission, *inter alia,* urged that, in the face of the undisputed earnings forecast, market quotations could not be regarded as a proper guide for determining the investment value of the warrants and, further, that in disallowing any participation for the warrants the Commission was fully aware, as the record shows, of the market history of the warrants. (R. 130-150). On February 23, 1950, the court below denied the petition for rehearing. Judge Clark, who had previously concurred, dissented and voted to grant rehearing (R. 151).

REASONS FOR GRANTING THE WRIT

This case involves an issue of substantial importance in the administration of the Public Utility Holding Company Act. Perpetual warrants to buy the junior stocks of holding companies at prices having no fair relation to the underlying investment in subsidiary company properties, or to the earning capacity thereof, exemplified that irresponsible optimism in connection with the promotion of holding companies which the Congress included in its recital of evils to be eliminated by the Act.[4] Such option warrants have

[4] Section 1(b)(1) of the Act, 49 Stat. 803 (11 U.S.C. 79a(b)(1)) expressly declares that one of the evils which the Act intended to eliminate stemmed from the fact that securities

already been dealt with in a number of prior Holding Company Act reorganizations, but remain to be dealt with in connection with several of the major holding company systems.[5] The decision below requires the Commission to value option warrants upon a basis which marks a radical departure in the interpretation of the fair and equitable standard of Section 11(e), and accordingly has implications far beyond the cases which directly concern option warrants. By this decision, the Commission is required to take value from senior security-holders for the benefit of a junior interest on the basis of criteria as elusive and speculative as that irrational optimism which the Congress considered should no longer be permitted as a predicate for even voluntary transactions in holding company securities. In addition, because

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have been "issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and * * * in anticipation of excessive revenues from subsidiary public-utility companies."

[5] Warrant holders have been denied participation under Section 11(e) of the Act in the reorganization of *American & Foreign Power Co.*, Holding Company Act Release Nos. 7815, 7849 (1947), enforced and affirmed, 80 F. Supp. 514 (D. Me.). This plan was subsequently withdrawn because changed circumstances had made the plan unfeasible, and a new plan is now pending before the Commission. There is also pending before the Commission a Section 11(e) plan for the reorganization of The United Corporation which has outstanding perpetual warrants. Holders of perpetual warrants have also been excluded from participation in the reorganization of Commonwealth & Southern Corporation. See *In re Commonwealth & Southern Corp.*, 84 F. Supp. 809 (D. Del.) (appeal pending).

For cases in which warrant holders have been allowed participation, see note 11 *infra*, p. 17.

of the lack of any detailed explication of the new valuation technique which the Commission is required to follow on remand, the decision below poses grave administrative difficulties including uncertainty as to how the Commission can value options and similar securities with a reasonable prospect of being upheld on appeal and thus permit completion, without interminable delay, of the task of holding-company simplification. The court below relied on this Court's decision in the case of *Otis & Co.* v. *SEC,* 323 U. S. 624, and in so doing, we believe, misconstrued that decision in a manner which requires correction by this Court.

1. By the terms of their contract, the warrant holders were not entitled to share in the assets of the company except by becoming stockholders through payment of the option price.[6] The warrant holders' claim to participate in the assets at the expense of stockholders could be supported under the decisions of this Court only upon the theory that the Act's frustration of their executory contract would otherwise take something of

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[6] Under the terms of his contract, the warrant holder "is entitled to purchase at any time (without limit)" common stock of Niagara Hudson at the rate of $42.86 per share, and "to receive a certificate for the shares of Common Stock so purchased upon presentation and surrender of his Class B Option Warrant duly endorsed and upon payment of the purchase price * * *. This Class B Option Warrant does not entitle the holder thereof to any rights whatsoever as a stockholder of the Corporation." (R. 143, 145.)

measurable value from the warrant holders resulting in an unfair "windfall" to the stockholders. See *New York Trust Co.* v. *SEC,* 131 F. 2d 274 (C.A. 2), certiorari denied, 318 U. S. 786, discussed in *SEC* v. *Central-Illinois Securities Corp.,* 338 U.S. 96, 136-139. To give the warrant holders more than their contract rights without proof of an equivalence between what is accorded and the right surrendered or terminated by the plan contravenes the rule of strict priority, which is basic to the "fair and equitable" standard. See *Case* v. *Los Angeles Lumber Products Co.,* 308 U.S. 106, 115-119; *Otis & Co.* v. *SEC,* 323 U.S. 624, 634; *SEC* v. *Central-Illinois Securities Corp.,* 338 U.S. 96, 130.

The Commission's finding of no value for the warrants necessarily was a negative finding, stating, "We cannot find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future" (R. 82). The court below does not hold that the record required, or would even support, a contrary finding by the Commission.[7] Nor does the opinion below question the Commission's conclusion that the present and prospective value of the common stock was far below the exercise

[7] Respondent, appellant below, did not bring the administrative record to the court below but relied merely on the findings of the Commission and of the district court.

price of the warrants or the adequacy of the voluminous valuation data in the record to support the Commission's earnings forecast which was a step to that conclusion.[8] Indeed, the court below itself accepted the Commission's earnings forecast and deduced therefrom a present value for the old common stock equal to only about one-third of the exercise price of the warrants. (R. 124). Nevertheless it concluded that "we cannot agree that there was any evidence 'substantial' or insubstantial to support the finding that these 'warrants' were wholly worthless" (R. 126). This conclusion appears to us to rest upon nothing more than the inherent uncertainty of any valuation, and the consequent impossibility of proving that the common stock of Niagara Hudson could not for *unforeseeable* reasons acquire a future value several times as high as the amount accepted as its present and prospective value. We believe that to compensate junior security holders at the expense of senior security holders because of nothing more than the

[8] As Judge Clark notes, the majority opinion "does not mention the strong case the Commission builds to show that, except for a gambler's chance in the market, the warrants will never produce results from the holders" (R. 126). The remoteness of the possibility that future income would greatly exceed the Commission's forecast is underlined by the circumstance that the level of operating earnings represented by the Commission's forecast was sufficient to yield the relatively high rate of return of approximately 6.53 per cent upon what the record indicated to be the approximate rate base (R. 70). There is evidence that the New York Commission would be likely to insist upon rate reductions in the near future (R. 71).

impossibility of proving that a rational forecast is infallible, is just as much an invasion of the rule of strict priority as to countenance a payment for the purpose of merely stifling opposition or to recognize the type of "colloquial equity" rejected by this Court in the *Engineers* case (*SEC* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 151-152). We submit that, just as in bankruptcy reorganization,[9] under the "fair and equitable" standard of Section 11(e), reasonably prospective earnings constitute the primary criterion for the purpose of determining the value of any class of securities with respect to which the right to participate in the proposed reorganization is asserted.[10] It is immaterial whether the interest asserted represents debt, preferred or common stock, or option warrants.

2. The opinion below rests upon what we believe to be a misinterpretation of this Court's decision on *Otis & Co.* v. *SEC*, 323 U. S. 624, requiring correction by this Court. The opinion states that in the *Otis* case the common stock "had no 'equity' over the preferred shares at the existing values of

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[9] *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 525-526; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 540-542; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 483.

[10] *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 130; *Otis & Co.* v. *SEC*, 323 U. S. 624, 631-632; *Lahti* v. *New England Power Association*, 160 F. 2d 845 (C. A. 1); *In re Community Gas & Power Co.*, 168 F. 2d 740 (C.A. 3), certiorari denied, 334 U. S. 846; *In re Electric Power & Light Corp.*, 176 F. 2d 687 (C. A. 2).

the assets" and "That necessarily involved a holding that, although the estimate of 'foreseeable' earnings did not justify a conclusion that they would ever leave a margin over the preferred dividends, the chance that there might be a margin was not to be denied the common stock" (R. 125). We believe this interpretation of the *Otis* case to be erroneous. In that case, this Court sustained the action of the Commission in granting a 5.48% participation in the assets of a holding company to common stockholders who had no present right to earnings because of large preferred dividend arrearages. Such participation was upheld because, upon the Commission's estimate of earnings, it appeared that, in the absence of reorganization, arrearages on preferred stock would be paid off in 15 years and the common stock would then acquire a right to a substantial share in the earnings of the enterprise. The earnings forecast made by the Commission, while liberal, coincided with the average system earnings for the prior six years, after controversial adjustments for certain items regarded as non-recurrent, and the earnings for the last 12-month period then available, without any such adjustment, actually exceeded the Commission's forecast. See *United Light & Power Co.*, Holding Company Act Release No. 4215, at page 17. Thus the forecast, although disputable, was not a wholly arbitrary one. The major controversy upon which both this Court and the Com-

mission divided was whether the preferred stockholders' liquidation preference including arrears should be valued merely on the basis of its going concern value rather than as a matured claim. Once this issue was resolved in favor of the common stockholders, it was a matter of mathematical computation to conclude from the Commission's earnings forecast that the common stockholders had a real interest in the going concern, although of course there was a risk factor which the Commission took into account in determining whether approximately 5% of the company's assets was the equitable equivalent of the interest surrendered.

We do not question that the doctrine of the *Otis* case is applicable to defining the rights of holders of unexercised option warrants to receive upon the liquidation or reorganization of a holding company the "equitable equivalent" of their interests in the going concern.[11] Here, however, the Com-

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[11] The court below noted prior decisions of the Commission which had permitted option holders to participate where the exercise price of the warrants was close to the Commission's estimate of present value for the stock subject to option and where the participation was based not on a forecast that the common stock would rise in value sufficient to make the option worth exercising but rather upon a recognition that since valuation is not an exact science there was a possibility not utterly remote of the stock reaching the exercise price (R. 124). See, for example, *In re Electric Power & Light Corp.*, 176 F. 2d 687, 691 (C. A. 2); *Community Gas & Power Co.*, Holding Company Act Release No. 6436, pages 29-30 (1946).

On the other hand, the Commission has consistently denied participation to holders of junior securities, including option warrants, where the possibility of the security ever having a value if the enterprise had continued without reorganization seems utterly remote. See, for example, *In re Standard Gas*

mission has concluded as a matter of fact that the Niagara Hudson warrant holders did not have any measurable interest in the going concern, and, unlike the situation in the *Otis* case, there was here no starting point in foreseeable earnings to support a forecast that the warrant holders could ever have a valuable interest in the going concern. While the legislative history reviewed in the *Otis* case indicates an intention on the part of the Congress that in the administration of Section 11 the Commission should recognize all legitimate investment values, there was no intention of requiring recognition of wholly irrational or conjectural values based upon nothing more than the speculators' appraisal of remote contingencies. See *Otis & Co.* v. *SEC*, 323 U. S. 624, 636.

3. The opinion below rests heavily upon the market history of the warrants, which history the court below regarded as conclusively establishing some value in excess of zero in the face of all contrary indications from analysis of the company's earnings prospects. The court below does not deduce a value for the warrants from market quotations as of any particular date and notes the wide

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& *Electric Co.*, 59 F. Supp. 274 (D. Del.) reversed on other grounds, 151 F. 2d 326 (C. A. 3), certiorari denied, 327 U. S. 796; *In re Central States Power & Light Corp.*, 74 F. Supp. 360 (D. Del.); *In re United Gas Corp.*, 58 F. Supp. 501, 519 (D. Del.); *In re Commonwealth & Southern Corp.*, 84 F. Supp. 809, 811 (D. Del.) (appeal pending).

variation in quotations.[12] To the court below, it was not important that the warrants varied in price or that there was a substantial variation from time to time in the relationship between the price of the warrants and the common stock. "What was important was that at no time did the 'warrants' become worthless, not even when the shares had gone down to their low of seven-eighths." (R. 123). While the opinion below expressly disclaims any intention of suggesting what value the Commission should ascribe to the warrants, we infer that the court below expects the Commission on remand to deduce from the market history of the warrants a conclusion as to the price at which the warrants might sell if there were no requirement for reorganization and that the warrant holders' participation be based on a value intermediate between that price and the zero value indicated by the Commission's earnings analysis.

Apart from the difficulty of appraising how the market would value the warrants in the absence of the Act's requirement for reorganization, we believe that it is a departure from all reorganization precedent to require an agency with statutory re-

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[12] The quotations ranged from a high of 9⅜ in 1932 to a low of 1/32 in 1942. For the single year 1929, the range was from 70½ to 6, a variation of about 1100% between the high and the low. Quotations for the common stock of Niagara Hudson also varied widely, although the variation between high and low was not as great as in the case of the warrants (R. 90).

sponsibility for a "fair and equitable" reorganization to disregard its own best judgment and to accept in lieu thereof market quotations as the determinant of value. It seems to us that, where the most careful study of the company's earnings prospects fails to establish any rational basis to support a value for the warrants, there is no reason for attributing superior insight to those who bought the warrants over the years prior to the pending reorganization. To the extent that the market forecast is in no sense supported by estimated foreseeable earnings, such putative market judgments "reflect merely vague hopes or possibilities," and otherwise valueless junior interests cannot be permitted "to perpetuate their position in an enterprise on such ephemeral grounds." *Case* v. *Los Angeles Products Co.,* 308 U. S. 106, 123. Precisely the same considerations apply where the warrant holder is not receiving a comparable new investment in the reorganized enterprise but is claiming a cash equivalent of the warrant he is surrendering. See *SEC* v. *Central-Illinois Securities Corp.,* 338 U. S. 96, 143.

Moreover, insofar as past market transactions reflect anything more than most blind gambles, they necessarily represent mere traders' expectations of profit based on anticipated short-term market trends for the warrants, and, as such, market quotations are not even opinion evidence as to intrinsic

value.[13] Indeed, even with respect to a security of unquestioned intrinsic value, and under a plan which by its nature requires valuation with reference to market conditions, it would be the duty of the Commission to disregard "abnormal or highly speculative market values of a transient nature." *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 146. Where, as in this case, all the evidence in the record points to an absence of intrinsic value for a security, any inference that it might have a speculative market value is irrelevant. Recognition of such speculative considerations necessarily involves such a complete abandonment of traditional valuation techniques based upon earnings forecasts, as to call for corrective action by this Court.

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[13] As the opinion below notes, when the market price for the common stock rises the market price for the warrants also rises but at a proportionately higher rate. While, of course, market declines for the common stock are accompanied by correspondingly greater declines for the warrants, making it more risky to speculate in warrants than in stock, those who are actually astute enough or lucky enough to anticipate the ups and downs of the market can obtain greater profits with a given outlay of capital invested in the warrants than from speculating in the stock.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD RAUM,
Acting Solicitor General.

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Securities and Exchange Commission.

JULY, 1950

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NIAGARA HUDSON POWER CORPORATION
and
SECURITIES AND EXCHANGE COMMISSION,
Petitioners,

v.

M. VICTOR LEVENTRITT,
Respondent.

No. 211
212

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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Question Presented.

Did the U. S. Court of Appeals for the Second Circuit err in holding that there was no evidence to support the finding of the Securities and Exchange Commission that these option warrants were wholly worthless?

Reasons for Denying the Writ.

1. On its face, the Court below determined only that the Niagara Hudson option warrants were entitled to the same protection as other securities and that where a continuous market history over a period of twenty years shows value, and where nothing in the record supports a finding of no value, the Commission cannot wipe out a class of securities without compensation. Such a determination is in no conflict with the decisions of this or any other Court. What the petitions amount to essentially is a contention that the Court below erred in finding no evidence. That, however, is not a sufficient reason for granting certiorari, especially since petitioner does not claim that the Second Circuit has exceeded the scope of review permitted to the courts in appeals from administrative decisions.

2. The SEC asks for certiorari on the ground that the opinion of the Court below rejects "traditional valuation techniques" and requires the Commission "to disregard its own best judgment and to accept in lieu thereof market quotations as the determinant of value".

This argument does not do justice to the opinion of Learned Hand, *C. J.* While the Court below carefully refrains from suggesting what value the Commission should find, any implication that the standards applied in previous reorganizations would not be accepted is completely unwarranted. There can be no doubt, for instance, that adoption of the approach approved in *In Re Electric Power and Light Corporation*, 176 F. (2d), 687, 691 (CA 2d 1949) cert. denied, would fully meet the requirements of the Court of Appeals.

3. The Court below necessarily rejected the fantastic notion advanced by the SEC that a perpetual option warrant is worthless unless the Commission finds it "reasonably probable" that the stock will surpass the option price "within the foreseeable future". It was this proposition, supported neither by reason nor by authority, which the Court below refused to swallow as a substitute for evidence. That Court, although it noted their conservatism, did not take exception to the earnings forecast on which the Commission based a finding that the *common stock* of Niagara was presently worth about its market price. It rejected the *non sequitur* that *therefore* a perpetual option to buy it at three times *present* value was *necessarily worthless.*

The Court of Appeals, reviewing the market history of these option warrants, found that their price always represented a significant fraction of the price of the common stock—that while that fraction varied, the variations were such as might reasonably and logically be expected, reflecting an economic law governing the price relationships. The SEC cannot arbitrarily select standards of value, rejecting those which are customarily applied by well-informed investors. On the contrary, in considering past and estimated future earnings, probable ability to pay dividends, and normal prevailing yields and capitalization factors, it should place itself, as required by this Court, in the position of an intelligent investor and should apply the same tests he would use. But this investor, in appraising perpetual option warrants to buy stock at substantially above the current market, does not consider only those factors which determine the value of securities which are bought primarily for yield. The value of such a warrant is, as Judge Learned Hand said (at page 727) "the result of a willingness to pay cash for the chance that the market's judgment as to the future of the property may be too unfavorable". Such warrants are often bought as a "hedge" by extremely conservative investors in times, like the present, when

inflation threatens the real value of their large holdings of bonds and other fixed dollar value securities.

While showing all due respect for the SEC's findings of economic fact, the Court below did not endorse the Commission's assumed prerogative of writing new economic law. The mandate simply requires the SEC to do its job as an appraiser—to determine what a willing buyer would pay a willing seller for the rights embodied in these option warrants if the Act had not intervened to cut them off.

4. The SEC's petition for certiorari shows such a complete misunderstanding of its functions in this case and of the opinion below as to cast grave doubt on its ability properly to carry out the mandate of the Court of Appeals. (See p. 10 of the SEC's petition for rehearing below, p. 150 of the printed record here). An opinion by this Court may be needed to clarify the questions troubling the Commission, which may otherwise render abortive the further proceedings which are now required. This Court may accordingly wish to grant the writ in order to anticipate the questions which almost certainly will be presented at a later stage in the proceedings.

We recognize, however, that this Court may well view the matter as premature for review, particularly since the SEC did not, as Clark, *J.* pointed out in his separate concurring opinion, give any consideration at all to market value which is obviously pertinent, whether or not decisive. Should this be the case, it appears that no question has been raised which necessitates present consideration by this Court.

Respondent therefore prays that the petitions for certiorari be denied.

Respectfully submitted,

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M. Victor Leventritt,

Attorneys for Respondent.

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Argued by
RANDALL J. LEBOEUF, JR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 211

NIAGARA HUDSON POWER CORPORATION,
Petitioner,

v.

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Respondent.

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SECURITIES AND EXCHANGE COMMISSION,
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v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR NIAGARA HUDSON POWER CORPORATION

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INDEX

	PAGE
Opinions Below	1
Grounds of Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
The Issues Raised	5
Specification of Errors	8
Point I—The Commission's findings were supported by substantial evidence.	8
Point II—The Commission was not bound to recognize past market value as a primary criterion in evaluating the warrants.	11
Point III—The Court below has exceeded the scope of judicial review.	14
Conclusion	17
Appendix	19

Citations

Cases:

In re American & Foreign Power Co., 80 F. Supp. 514	11
In re Central States Power & Light Corporation, 74 F. Supp. 360	11
In re Commonwealth & Southern Corporation, Adelaide H. Knight, Appellant, 184 F. 2d 81	12, 15

PAGE

In re Community Gas & Power Co., 168 F. 2d 740, cert. den., 384 U. S. 846 10

Consolidated Rock Products v. *DuBois*, 312 U. S. 510 ..... 10(fn)

Ecker v. *Western Pacific Railroad Corp.*, 318 U. S. 448 ..... 10(fn)

In re Electric Power & Light Corp., 176 F. 2d 687 10

Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523 ..... 10(fn), 11

Lahti v. *New England Power Association*, 160 F. 2d 845 10

National Labor Relations Board v. *Link-Belt Company*, 311 U. S. 584 15

Opp Cotton Mills v. *Administrator*, 312 U. S. 126 15

Otis v. *Securities and Exchange Commission*, 323 U. S. 624 ..... 10, 13(fn), 16

Securities and Exchange Commission v. *Central-Illinois Securities Corp.*, 338 U. S. 96 ..... 10, 14

South Chicago Company v. *Bassett*, 309 U. S. 251 15

In re United Gas Corporation, 58 F. Supp. 501, aff'd 162 F. 2d 409 11

Wilmington Trust Co. v. *Helvering*, 316 U. S. 164 15

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Opinions Below

The opinion of the Court of Appeals (R. 122-126, 128) is reported in 179 F. 2d 615. The opinion of the District Court (R. 107-112) is reported in 86 F. Supp. 697. The findings and opinion of the Securities and Exchange Com-

mission, dated August 16, 1949, and its order dated August 25, 1949 have not yet been officially reported, but are set forth in the Commission's Holding Company Act Releases Nos. 9270, 9295 (R. 48-95, 103-104).

Grounds of Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit (R. 128) reversing the order of the District Court for the Northern District of New York (R. 113-119) comes before this Court on a writ of certiorari granted October 9, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79y).

Statutes Involved

The pertinent provisions of Section 11(b) and 11(e) of the Public Utility Holding Company Act of 1935 are set forth in Appendix A, *infra*, pages ~~18~~ 19 to ~~20~~ 21.

Question Presented

Where, in connection with a reorganization and liquidation of a public utility holding company, the Securities and Exchange Commission has found that, under the "fair and equitable" standard of Section 11 of the Public Utility Holding Company Act, no participation should be given to option warrants issued by the holding company entitling the holders thereof to purchase stock of the holding company at a price greatly in excess of the current market value of the stock, and greatly in excess of any rational forecast of the future value of said stock, may the Court of Appeals require participation in the reorganization for such option warrants solely because the option warrants were previously traded in the market at some value?

Statement of the Case

Niagara Hudson Power Corporation (Niagara Hudson) is a registered holding company under the Public Utility Holding Company Act of 1935 (the Act). This case involves plans filed by Niagara Hudson under Section 11(e) of the Act providing for the reorganization of the Niagara Hudson System and for the ultimate dissolution of Niagara Hudson, the top holding company. One of the issues before the Commission and the District Court, and the principal question dealt with by the opinion of the Court of Appeals, was whether under the "fair and equitable" standard of Section 11(e) any participation should be accorded to the Class B option warrants (the warrants) of Niagara Hudson. Other aspects of the plans filed by Niagara Hudson, which do not concern the warrants, are not the subject of controversy in this proceeding.

At the times of filing of the plans Niagara Hudson had outstanding certain notes payable to banks, first and second preferred stock, common stock and Class B option warrants. The warrants represented options to purchase, at any time, common stock of Niagara Hudson, each warrant entitling the holder thereof to purchase 1-1/6 shares of such common stock at a price of $50.00 per share, or at the rate of $42.86 per share (R. 52).

Both plans were filed by Niagara Hudson under Section 11(e) for the purpose of complying with the provisions of 11(b) (2) of the Act, and the Commission's order and requirements thereunder (R. 54, 58-59). The first of the plans (herein referred to as the "Consolidation Plan"), which has been consummated and is in no respects challenged in this proceeding, provided for the consolidation of Niagara Hudson's three principal operating subsidiaries into a new corporation known as Niagara Mohawk Power

Corporation (Niagara Mohawk). Pursuant to the Consolidation Plan, Niagara Mohawk issued all of its common stock to Niagara Hudson, and the preferred stock of Niagara Mohawk was issued on a share for share basis to the preferred stockholders of the constituent companies.

The second plan (herein referred to as the "Dissolution Plan"), which was contingent upon the Consolidation Plan becoming effective, called for the exchange of all the outstanding preferred stock of Niagara Hudson for Class A convertible stock of Niagara Mohawk, and for the exchange of all the common stock of Niagara Hudson for common stock of Niagara Mohawk upon certain terms and conditions stated in the plan. It was contemplated by the Dissolution Plan that after the payment of Niagara Hudson's outstanding bank loans and the transfer of Niagara Hudson's miscellaneous assets to Niagara Mohawk, Niagara Hudson would be dissolved. No provision was made in the Dissolution Plan for the outstanding option warrants, and the rights of the warrant holders were to be terminated as of the effective date of the plans.

The proceedings with respect to both plans were consolidated, and after hearings the Commission on August 16, 1949 issued its findings and opinion approving, with certain modifications which were thereafter made (R. 97-102), both plans as necessary to effectuate the provisions of Section 11(b) of the Act, and as "fair and equitable" to the persons affected by the plans.

Application was thereafter made by the Commission to the District Court for the Northern District of New York to enforce and carry out the terms and provisions of the plans. Respondent, who had not appeared at the hearings before the Commission, entered an appearance in the District Court for the purpose of challenging the Com-

mission's determination that no participation should be accorded to the holders of the Niagara Hudson warrants. After hearing, the District Court rejected the respondent's contentions, and an order enforcing the plans was entered on November 4, 1949.

Respondent appealed to the United States Court of Appeals for the Second Circuit, which reversed that part of the order of the District Court enforcing the provisions of the Dissolution Plan relating to the warrants, and remanded the proceedings to the Commission for further action in accordance with the Court's opinion.

The Issues Raised

In considering the fairness of the plans the Commission reviewed the earnings and operations of Niagara Hudson for the years 1937-1948, and appraised the forecasts of future earnings and probable dividends submitted by expert witnesses and company officials. It then considered separately the treatment accorded by the plans to the holders of the preferred stocks of the three subsidiary companies which were to be consolidated, and to the holders of each class of the outstanding securities of Niagara Hudson.

The Commission's conclusion that the warrant holders were not entitled to participate in the assets was based upon the following findings (R. 82):

> "Under the plans, no provision is made for participation of the Class B. stock option warrants of Niagara Hudson and all rights represented by such warrants will terminate upon the dissolution of that company.
>
> The option warrants entitle their holders to purchase at any time 497,191-3/6 shares of Niagara Hudson common stock, each warrant entitling the

holder to 1-1/6 shares upon payment of $50. This is equivalent to an exercise price of $42.86 for one share. Since 1932, the Niagara Hudson or predecessor company common stock has never sold at a price higher than 18¼ and has sold as low as ⅞. During the same period, the option warrants have never sold higher than 5 and have been as low as ⅛. In 1948, the prices for the option warrants ranged from a high of 1 to a low of ⅛, and in 1949, from a high of ¼ to a low of ⅛.

In considering the participation to which option warrant holders may be entitled, the test is basically the same as that applied with respect to the other types of securities, that is, what value, if any, is being given up by the surrender of the rights attaching to that security. The price of $42.86, which a holder of an option warrant would have to pay for one share of Niagara Hudson common stock, is more than 30 times the estimate we have used of $1.39 as foreseeable earnings which would be applicable to that stock on the basis of present investment if Niagara Hudson were to continue. That price is about 3.5 times the recent high market prices for the Niagara Hudson common stock of around 12 per share.

If we were to assume that Niagara Hudson were to continue and its common stock were to sell in the future at a ratio of 15 times consolidated earnings, which would appear to be a very liberal assumption, it would require per share earnings of $2.86 to result in a price of $42.86 per share. Such earnings would represent an increase of 106% over the approximately $1.39 of earnings which we have found attributable to the present investment. On the basis of the more likely assumption that the price-earnings ratio at which the Niagara Hudson common stock would sell would be something less than 15 times, an even greater increase in earnings would be required to attain a per share price of $42.86.

> Under all the circumstances, we cannot find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future. Accordingly, we find that such option warrants have no recognizable value[59] and that the plans satisfy the standard of fairness and equity with respect to such option warrants in excluding them from any participation in the reorganization of Niagara Hudson."

The Court below accepted the Commission's earnings forecast and agreed that such forecast indicated a value for the common stock equal to about 1/3d of the exercise price of the warrants. It asserted, nevertheless, that there was no evidence "substantial or insubstantial" to support the Commission's findings that the warrants were wholly worthless, and suggested that the market history indicating that from time to time the warrants had been sold at prices ranging from 1/8 to 5 was evidence that the warrants possess some positive value.

In effect, the Court below rejected the Commission's valuation which was based upon foreseeable future earnings and foreseeable market price of Niagara Hudson common stock, if that corporation were to continue in existence, and rejected the Commission's conclusion that the past market history of the warrants did not justify participation of the warrants in reorganization. The issue squarely raised is whether the Court may substitute

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"[59] We recognize that the holders of the option warrants have a right to purchase common stock at any time, and that this perpetual feature has some present value no matter how remote or speculative the exercise of the right may be. The value to be accorded that right, however, in this case, is so small that as a practical matter we would not be justified in recognizing it for the purposes of a Section 11 reorganization. *Cf. Electric Power & Light Corporation*, —— S.E.C. —— (1949), Holding Company Act Release No. 8880."

its own valuation for that of the Commission and require some participation for the warrants in the Niagara Hudson Section 11 reorganization merely because the warrants were traded for value in the past.

Specification of Errors

The Court of Appeals erred:

(1) In holding that the evidence of past earnings and a forecast of future earnings, and of the past and a forecast of the future market value of the Niagara Hudson stock, upon which the warrant holders held a call, was not evidence, "substantial or insubstantial," upon which to base a valuation of the warrants.

(2) In holding that the evidence of past market value of the warrants required the Commission to ascribe some value to the warrants in a Section 11 reorganization.

(3) In exceeding the scope of judicial review by substituting its evaluation of the weight of the evidence for that of the Commission, and by substituting its judgment of the inferences to be drawn from the history of past trading in the warrants for that of the Commission.

(4) In failing to affirm *in toto* the order of the District Court enforcing the plan.

POINT I

The Commission's findings were supported by substantial evidence.

As indicated above, the Commission's conclusion that the warrant holders were not entitled to participate in the reorganization of Niagara Hudson was based upon an

estimate that if Niagara Hudson were to continue as a going enterprise its common stock would not in the foreseeable future sell at a price which would make advantageous the exercise by the warrant holder of the privilege to purchase such stock. This estimate assumed that Niagara Hudson might reasonably be expected to show average earnings in the future which would leave $1.39 per share for the common stock and that the price-earnings ratio at which the stock might sell would not exceed 15 times. This forecast is supported by voluminous evidence in the record, including the historic record of past earnings, the record of the market price of the stock since 1932 and by the opinion of the expert witnesses. The Court below neither challenged the reasonableness of the forecast nor the evidence upon which it was based.

Since the warrant holder's contract entitles him to purchase Niagara Hudson common stock at $42.86 per share, it is obvious, as the Commission pointed out, that the Niagara Hudson stock must sell at more than 30 times the foreseeable earnings for the exercise privilege of the warrant to be of any value. The Commission, quite properly, rejected a 30-times earnings market price as a reasonable possibility, and assumed instead a ratio of not more than 15 times earnings. On this basis Niagara Hudson would have to earn $2.86 per share to result in a market price of $42.86—earnings which the Commission concluded were not reasonably foreseeable for Niagara Hudson, a regulated public utility.

In view of its forecast, the Commission concluded, "Under all the circumstances we cannot find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future."

Although the opinion below does not specify in detail the reasons for the conclusion that there is no evidence, "substantial or insubstantial", to support the Commission's conclusions, the suggestion is implicit that the Court rejects as evidence a forecast of reasonably foreseeable earnings and market prices and requires the Commission to speculate as well on *unforeseeable* conditions. It is submitted that this Court and lower courts recognize that a reasonable forecast of prospective earnings is the primary criterion for the purpose of determining the extent to which any class of security should be allowed to participate in a reorganization under Section 11(e) of the Act. *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 130; *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 631-32; *Lahti* v. *New England Power Association*, 160 F. 2d 845 (CA 1); *In re Community Gas & Power Co.*, 168 F. 2d 740 (CA 3), cert. den., 384 U. S. 846; *In re Electric Power & Light Corp.*, 176 F. 2d 687 (CA 2). This standard of valuation, which has long been accepted in bankruptcy reorganization* proceedings, is equally applicable to reorganizations under Section 11.

Since the Court below does not deny, and in fact, recognizes that there is evidentiary support in the record for the Commission's forecasts, its conclusion can only be premised upon a theory that such forecasts do not constitute evidence. As indicated by the cases cited, reasonable forecasts of earnings and market prices are regarded as evidence supporting conclusions as to valuation. It is submitted, therefore, that the determination of the

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* *Consolidated Rock Products* v. *DuBois*, 312 U. S. 510, 525-26; *Group of Institutional Investors* v. *Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523, 540-542; *Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448, 483.

Court below that there was no evidence to support the Commission's conclusions, is based upon a misapplication of the law.

There is ample evidence in the record that no reasonable forecast of future earnings of Niagara Hudson would indicate a market value for its stock, were it to continue as a going concern, in excess of, or even approaching the exercise price of the warrants. There is, thus, "substantial" evidence to support the Commission's conclusion that the warrants have no recognizable value in this Section 11 proceeding.

POINT II

The Commission was not bound to recognize past market value as a primary criterion in evaluating the warrants.

The Court below took cognizance of the market history of the warrants over a period of years and concluded, "So far, therefore, as a long series of sales is evidence of value, the warrants had substantial value." Intrinsic value, rather than market value, however, has invariably been adopted by the courts in appraising securities for the purposes of reorganization. *Group of Institutional Investors* v. *Milwaukee, St. Paul & Pacific Railroad Co., supra; In re American & Foreign Power Co.*, 80 F. Supp. 514; *In re Central States Power & Light Corporation*, 74 F. Supp. 360; *In re United Gas Corporation*, 58 F. Supp. 501, aff'd 162 F. 2d 409. Although the Commission gave full recognition to the market history of the warrants, it was not required to consider anything but intrinsic value.

Only recently the United States Court of Appeals for the Third Circuit had occasion to discuss this question in

In re Commonwealth & Southern Corporation, 184 F. 2d 81. In that proceeding, the appellant, as here, challenged a determination of the Commission in a Section 11 reorganization that the warrants of Commonwealth & Southern Corporation were entitled to no participation. There, as here, the appellant laid great stress upon the asserted market values of the warrants in the past. In dismissing this contention, the Court of Appeals for the Third Circuit said (p. 85):

> "It is said that the Commission should have been governed solely by what is asserted to have been their market value in determining the worth of the warrants. In support of this a chart is offered covering the years from 1931 to 1948. This shows that the annual mean prices of the common stock and of the options have a ratio of approximately eight to one. Appellant contends that the Commission must allow participation by the warrant holders in that proportion. We disagree. Were the proportionate table submitted by appellant a far more accurate gauge of market value than it is, it would still be only some evidence of going business value and in no wise controlling. Such evidence is only remotely connected, if at all, with a determination of the going business value of an option warrant, which is the test laid down by the Otis and Engineers opinions. The Commission had before it evidence which it was entitled to accept, that the possibility of future earnings of Commonwealth sufficient to establish value in the warrants was extremely remote. That evidence is not eliminated or necessarily rendered less credible, simply because there was testimony from which some value could be attributed to the stock. At any rate, we think the option prices during the years covered represent, to a large extent, out and out market

> gambling, plus (since the existence of the Commission and its consideration of this case) deliberate speculation as to what the Commission's course would be in connection with the option warrants in question."

Market values of option warrants are arrived at through the exercise of a speculative judgment of traders in the market place. They represent the expression of a gambler's guess as to future market price of the security which the warrant holder, under his contract, has an option to purchase. This aleatory valuation is manifestly unsound and manifestly contrary to the purpose of Congress in delegating to the Commission the valuation of securities in Section 11(e) reorganization proceedings.* The Commission was, thus, more than justified in refusing to consider that evidence of past trading was evidence of intrinsic value.

The insistence of the Court below, that past market value *per se* is evidence of intrinsic value, is contrary to law.

---

* The Court below expressed the view that in *Otis* v. *Securities and Exchange Commission, supra,* values had been ascribed to securities whose value was "quite as speculative" as that of the warrants. In the *Otis* case, however, the Court was not dealing with warrants representing an option to purchase stock, the holders of which had no interest in the corporation until exercise, but with common stock which would be entitled to a substantial equity in the corporation if the arrearages of preferred dividends were paid off. The Commission's forecast of future earnings in that case indicated that the preferred arrears would be eliminated within fifteen years and therefore, concluded that some equity should be ascribed to the common stock in the reorganization, since there was a foreseeable equity if the corporation should continue as a going concern. The speculative feature to which the Court refers was premised upon foreseeable earning and not upon past history of market trading.

POINT III

The Court below has exceeded the scope of judicial review.

This Court has recently defined the degree of finality which must be accorded to administrative findings as to valuation in *Securities and Exchange Commission* v. *Central-Illinois Securities Corp., supra.* There the late Mr. Justice Rutledge said (p. 126):

> "Administrative finality is not, of course, applicable only to agency findings of 'fact' in the narrow, literal sense. The Commission's findings as to valuation, which are based upon judgment and prediction, as well as upon 'facts,' like the valuation findings of the Interstate Commerce Commission in reorganizations under §77 of the Bankruptcy Act, * * * are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards.'"

The Commission's conclusions were here based upon the facts of past earnings and past market value of the Niagara Hudson stock and upon its judgment and prediction as to future earnings and future market values for such stock. Both of these criteria have, as indicated above, been approved by this and lower courts as proper evidentiary and legal standards which the administrative agency may consider and adopt. The Commission's findings here are, therefore, final and not subject to reexamination and redetermination by the Court below.

The decision of the Court below would seem to indicate that evidence is to be regarded as substantial only if there is no other evidence from which a different inference might be drawn. Such a theory is clearly untenable and at variance with the settled doctrine that questions as to

the weight to be given evidence, or as to the inferences to be drawn therefrom, are to be resolved by the fact finding administrative agency and not by the reviewing court. *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584; *South Chicago Company* v. *Bassett*, 309 U. S. 251.

It is thus clear that even if the evidence of past market value of the warrants were an acceptable criterion in evaluating the participation of such warrants in Section 11(e) reorganization, the Court would not be empowered to require the Commission to give recognition to such market value if there were other substantial evidence upon which the Commission had relied. The argument is again well stated in the opinion of the Court of Appeals for the Third Circuit in the *Commonwealth & Southern* case, *supra* (p. 83), "Assuming that the Commission had before it conflicting evidence as to value, that part of the evidence on which the Commission based its finding is not destroyed, and with the scope of our review limited as it is, though we might disagree with the result reached, so long as that result is supported by substantial evidence, we are without power to alter it."

It is not disputed that the evidence of the past market value of the warrants was before the Commission and recognized by it. It only appears that the Commission's conclusion was based upon the more compelling evidence that neither the past market history and earnings, nor the foreseeable future earnings, indicated that Niagara Hudson stock would ever sell at a price in excess of the exercise price of the warrants. This same type of evidence underlies the Commission's similar determination in the *Commonwealth & Southern* case and was described by the Court of Appeals for the Third Circuit as "well within the substantial evidence rule".

The warrant holder has no rights whatever in the corporation until he elects to exercise his privilege to purchase its stock. In the case of the Niagara Hudson warrants, which are described as "perpetual", the right exists only as long as Niagara Hudson continues as a going concern. The Commission, however, did not base its decision in any way upon the fact that the plans filed contemplated the imminent dissolution of Niagara Hudson (which it is now indicated will take place on December 2, 1950), but followed the principles dictated by this Court in *Otis* v. *Securities and Exchange Commission*, 323 U. S. 624, and evaluated the warrants from the standpoint that Niagara Hudson would continue as a going concern. On this basis, and assuming a liberal estimate of the market value of the common stock of Niagara Hudson at 15 times consolidated earnings, it appeared an increase of about 106% over the reasonably foreseeable earnings of the corporation would be required to make the value of its stock approximate the exercise price of $42.86 per share, payment of which would be required of the warrant holder before becoming entitled to any rights as a security holder in the corporation. The Commission thus concluded that the warrants had no recognizable value.

The compelling force of the reasons underlying the Commission's conclusions was recognized by Judge Clark in a separate opinion, concurring in the result of the opinion below:

> "* * * The opinion cites and relies only on these market quotations and does not mention the strong case the Commission builds to show that, except for a gambler's chance in the market, the warrants will never produce results from the holders. This is based on past, present, and prospective earnings, and the small possibilities of increased income in this state-regulated utility to a point where the vast gap between present values and those necessary

to make the warrants usable will be made up; it represents in general the values soundly to be put upon the various security interests in any but a speculative market."

Whether or not, however, the Court below agrees with the result reached by the Commission is immaterial. The scope of its review is limited to an inquiry as to whether the Commission relied upon substantial evidence and whether correct legal standards were used.

The correctness of the legal standards applied by the Commission in arriving at its valuation—past earnings and prices and foreseeable future earnings and prices of Niagara Hudson stock—is unassailable. The evidence supporting such determinations and forecasts is undisputed even by the Court below. The Commission's determination is, therefore, not subject to judicial review irrespective of the opinion of the Court below as to the weight which it would accord to the past market history of the warrants.

CONCLUSION

For the reasons stated, the decision and judgment of the United States Court of Appeals for the Second Circuit should be in all respects reversed and the decision of the District Court for the Northern District of New York, as originally entered, should be affirmed.

Respectfully submitted,

RANDALL J. LEBOEUF, JR.,
CRAIGH LEONARD,
LAUMAN MARTIN,
Counsel for Petitioner.

Dated: November 13, 1950.

APPENDIX A

Excerpts from Section 11 of the Public Utility Holding Company Act of 1935

"Sec. 11

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * * * * * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

Appendix A

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * * * * * * *

(c) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary compan thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such

extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 211

NIAGARA HUDSON POWER CORPORATION, *Petitioner*

v.

M. VICTOR LEVENTRITT, *Respondent*

No. 212

SECURITIES AND EXCHANGE COMMISSION, *Petitioner*

v.

M. VICTOR LEVENTRITT, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF FOR NIAGARA HUDSON POWER CORPORATION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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REPLY BRIEF FOR NIAGARA HUDSON POWER CORPORATION

In our main brief we argued that the Commission's findings were supported by substantial evidence and in that connection we interpreted the decision below as accepting the Commission's forecast that the average earnings for the future would leave $1.39 for the common stock of Niagara Hudson Power Corporation, assuming that corporation were to continue as a going concern. Since respondent is now apparently unwilling to accept this earnings forecast, which he did not challenge below, the basis of the

speculative contentions raised in respondent's brief requires, in the opinion of counsel, a short reply.

Although respondent did not bring to the court below the actual record which was before the Commission and the District Court, he now attempts, on the basis of dubious inferences gleaned from data in the Commission's findings, to paint a far more glowing picture of Niagara Hudson's financial future than that which the Commission accepted in the light of the entire record. Thus, apart from the contingencies which respondent imagines, including developments of atomic power, which he assumes would be a favorable rather than an unfavorable factor, an attempt is made to show that the actual record before the Commission indicates a value for the old Niagara Hudson common stock equal to or approaching the warrant exercise price within the near future.

Respondent translates a forecast on the part of Ebasco Services, Inc. of future earnings of Niagara Mohawk Power Corporation, the new operating company, into a prophecy on the part of Ebasco that if Niagara Hudson Power Corporation, the holding company, were to continue in existence there would be earnings for the year 1952 of $2.40 per share applicable to the existing Niagara Hudson shares upon which the warrant holders hold options.

As illustrated in Table VII (R. 66) of the Commission's Findings and Opinion, the Ebasco forecast indicated projected earnings for Niagara Mohawk Power Corporation in 1952 in the amount of $25,297,000. The Ebasco forecast is merely a projection of certain figures based upon a number of assumptions which are spelled out in the Commission's Findings (R. 67), including the raising of an additional $10,000,000 by Niagara Mohawk through the sale of common stock, and that forecast was made irrespective of the continuance or dissolution of Niagara Hudson, the holding company. This forecast was considered too high by the Commission (R. 69-71), and, as we show below, is not immediately translatable into the present investment of the

common shares of the holding company if the latter were continued in existence.

Respondent gives no breakdown of the computations by which he translates the Ebasco forecast into present share earnings for the existing Niagara Hudson common stock. We assume that in arriving at the figure of $2.40 per share, respondent first deducted from the $25,297,000 projected Niagara Mohawk earnings the sum of $2,314,000 representing the dividend requirements on the Class A stock of the new operating company, and divided the balance, $22,983,000, by the 7,473,172 shares of common stock of the new operating company initially to be issued and outstanding pursuant to the plan. The resulting figure of $3.08 per share was presumably then multiplied by respondent by .78, since under the Plan the holder of each share of Niagara Hudson common stock is entitled to receive .78 shares of Niagara Mohawk common stock upon dissolution, and from these computations respondent apparently derives approximately $2.40 per share for the Niagara Hudson common stock.

So far as we are able to ascertain, respondent's computations ignore entirely the assumption on the part of Ebasco that to realize the projected earnings, Niagara Mohawk would have to raise an additional amount of equity capital of $10,000,000. It is, of course, merely a matter of speculation as to whether, assuming that Niagara Hudson would continue in existence, the additional equity capital would be raised by the sale of additional Niagara Mohawk or Niagara Hudson stock or as to the price at which such stock would be sold. In any event, the earnings of the new operating company attributable to the common stock of the holding company would be substantially less than respondent's computations indicate.

If we assume that $10,000,000 of new equity capital were raised through the sale of an additional 500,000 shares of Niagara Mohawk common stock at $20 per share (which is approximately the present market) and also assume that

none of the Class A were converted into Niagara Mohawk common stock (which is contrary to the fact), the earnings per share available to the Niagara Hudson common stock on the .78 ratio, after adjustment for the $750,000 estimated annual expenses of the holding company (R. 81), would be only $2.17 per share as opposed to the $2.40 computed by respondent.

Furthermore, to make the point that Niagara Hudson stock might one day sell at or near the exercise price of the warrants, $42.86 per share, respondent assumed that the stock would sell at 17.86 times earnings. There is no support in the record for the assumption that the common stock of a holding company would at any time in the foreseeable future sell at 17.86 times earnings. In fact, the Commission concluded that a 15 times earnings ratio was "very liberal" (R. 82) and the court below took a figure of 15 times the annual dividend (R. 124). Upon all assumptions most favorable to respondent, the earnings available to the Niagara Hudson common stock on the basis of a translation of the Ebasco forecast would thus, as has been illustrated, be $2.17 per share. Applying the 15 times earnings ratio, which the Commission found to be very liberal, the result would be only $32.55, or about $10 less than the exercise price of the option warrants.

In short, it is evident that any attempt to relate future earnings on Niagara Hudson common stock to the Ebasco forecast for the new operating company is dependent upon assumptions, speculations and adjustments of the kind indicated above which are not demonstrable by the slide rule approach adopted by the respondent. The Commission found that $1.39 per share was a reasonable forecast for the average annual earnings attributable to the common stock of Niagara Hudson Power Corporation if it were to continue in existence. This determination was made upon all the evidence in the record and in the exercise of the Commission's expert judgment. This finding is not now subject to review by this Court on the basis of an incom-

plete record and where the court below accepted the earnings forecast of the Commission, which forecast respondent did not challenge.

Respondent urges that the warrant should be valued on the same basis as that adopted by this Court in the *Engineers* case for valuing a preferred stock, namely, the cost of its replacement by a new security of comparable risk. See *SEC.* v. *Central Illinois Securities Corp.*, 338 U. S. 96, 144-146. We fail to see how the approach in the *Engineers* case is relevant to respondent's contentions here. As this Court there said, "The standard of compensation to be accorded security holders does not depend upon whether their security interests are to be retired by exchanging them for new securities in a continuing enterprise or by payment in cash." 338 U. S. at 143. The Commission having found that, on a rational hypothesis of future earnings, the warrants of Niagara Hudson had no present investment value, the warrant-holders were properly excluded from any participation, whether in kind or in cash. Since, as we have urged, the Commission was correct in concluding that it was impossible to make a rational appraisal that the warrants would ever reach the exercise price, it was equally impossible for it to make a rational comparison of the Niagara Hudson warrants with other warrants representing different and unrelated gambles. What respondent suggests is that, since the warrants are being eliminated, the Act requires that the common stockholders of Niagara Hudson furnish the warrant-holders with money to speculate in warrants of other companies. In *Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448, 475-476, this Court has specifically rejected the argument that claims of security holders, having no value, were entitled to participation by the issuance of warrants through which they might possibly recoup their losses as a result of unanticipated future earnings. By the same token, the warrant-holders in this case cannot insist upon a cash payment by which they might recoup their losses elsewhere in the market.

The extremity of respondent's position is indicated by his assertion (page 30 of his brief), where he claims "In a legal sense, option warrant holders, as well as creditors and preferred stockholders, are 'prior' to the common stockholders." This is a far cry from the provision of the option contract (R. 145) that the "warrant does not entitle the holder thereof to any rights whatsoever as a stockholder of the Corporation."

Respondent seeks participation upon the basis of "unforeseen" and "unanticipated earnings." That is directly contrary to all rulings of this Court.

Respectfully submitted,

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CRAIGH LEONARD,
LAUMAN MARTIN,
Counsel for Petitioner.

Dated: December 5, 1950.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

Nos. 211, 212

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Petitioner,

v.

M. VICTOR LEVENTRITT

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

M. VICTOR LEVENTRITT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

T. ROLAND BERNER,
M. VICTOR LEVENTRITT,
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Counsel for Respondent.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Questions presented	1
Statement	2
Summary of argument	3
Argument:	
I. The Court of Appeals correctly held that the SEC committed error of law by completely ignoring the perpetual call feature of the option warrants	7
II. The SEC committed error of law by failing to apply the appropriate test value of the option warrants; namely, their fair market value	30
Conclusion	41
Schedules and Charts	44, 45

CITATIONS

Cases:

American & Foreign Power Co., Holding Company Act Release No. 7815, 7849 (1947) aff'd, 80 F. Supp. 514	27
Andrews v. *Commissioner of Internal Revenue*, 135 F. 2d 314	34
Commissioner of Internal Revenue v. *Marshall*, 125 F. 2d 943	34
Commonwealth & Southern Corporation v. *SEC*, Holding Company, Release No. 7615	40
Ecker v. *Western Pacific R. Co.*, 318 U. S. 448	9
Electric Power and Light Corp., Holding Company Act Release No. 889 (1949) aff'd, 176 F. 2d 687, stay denied 337 U. S. 903	Passim 4, 5, 12
Equitable Office Building Corp., In re, unreported opinion of Mr. Justice Reed, August 6, 1946	24
Interstate Power Co., In re, 71 F. Supp. 164	27
Matter of Fulton, 257 N. Y. 487, 493	35

Page

Matter of Marcas, 273 App. Div. 725, appeal denied 274 App. Div. 822 35
Merritt-Chapman & Scott Corp. v. *New York Trust Co.*, CA (2) decided November, 1950 8
Otis & Co. v. *SEC*, 323 U. S. 624 7
People ex rel. Parklin Operating Company v. *Miller*, 287 N. Y. 126 34
People ex rel. New York Stock Exchange v. *Cantor*, 221 A. D. 193, aff'd w. o. opinion, 248 N. Y. 533 35
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Statutes:

Public Utility Holding Company Act of 1935, 49 Stat. 803:

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Section 11 (e) 2, 28

Miscellaneous:

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below, Jurisdiction and Statute Involved

These are set forth in the Government's brief at 1-4.

Questions Presented

The S. E. C. extinguished the option warrants herein without compensation. Was this not error of law, in the light of the following?

1. The S. E. C. refused to give recognition to the acknowledged value inhering in the warrants with their perpetual call feature.

2. The S. E. C. failed to apply to the option warrants the appropriate tests of value.

3. The S. E. C. wholly ignored the fair market value of the option warrants.

Statement

This case involves one of two plans filed under Section 11 (e) of the Public Utility Holding Company Act of 1935 by Niagara Hudson Power Corporation, a registered holding company. This plan contemplates dissolution of Niagara Hudson and the distribution of its assets among its stockholders after provision for the discharge of its indebtedness. The principal question dealt with by the Court of Appeals, was whether, under the "fair and equitable" standard of Section 11 (e), the Commission erred in extinguishing the Class B stock option warrants of Niagara Hudson without compensation. There are outstanding warrants to buy almost 500,000 shares of common stock. Each warrant gives the holder a perpetual right to call upon the company to issue 1⅛ shares of common stock for $50; i. e. a "call" on the common shares at $42.86 a share. The stock of Niagara Hudson is listed and actively traded on the N. Y. Curb Exchange and has recently been selling for between $15.50 and $16 a share or roughly ⅜ of the option price. The "high" price for the year to date has been 17⅞, the "low" 12½, a range of from 42% to 32% of the option price.

The warrants also were listed on the N. Y. Curb Exchange until 1949, when the Commission approved the plan providing for their extinction without compensation. The annual price range of the common stock and the option warrants from 1929 to 1949 is set forth at R. 90. The

relationship of the annual mean prices is depicted in Chart A at the end of this brief. Since the Commission has objected at footnote 17, page 33 of its brief to the use of such "a deceptively simple chart" we have also annexed Chart B at the end of this brief, using quarterly closing prices for the period 1937 to 1947.[1]

Both charts make visibly apparent the fact that except when depressed by the moves of the Commission against these and other warrants, the market prices of the warrants and the common stock generally moved together and that when the stock sold within its recent range, the normal ratio between the two was approximately one share equals 5.5 warrants.[2]

Market history shows that in 1936 the common stock sold at 17¾ and the warrants at 3¾ and in 1946 the stock sold at 15 and the warrants at 3⅜. Based on these figures the approximately 500,000 warrants outstanding would have, in the absence of the Commission's action to extinguish them, an aggregate market value in excess of $1,500,000.

Further facts, particularly the earnings forecast applicable to the Company, are set forth in the body of the argument.

Summary of Argument

The Commission's elimination of the perpetual option warrants "must be conditional upon giving the 'warrant' holders a fair equivalent in cash; and the Commission and

---

[1] It is our opinion that Chart A more fairly depicts the normal relationships prevailing between the two securities than Chart B, which, by reason of the arbitrary selection of prices at particular dates, and is unduly affected by those conditions of a "temporary and speculative nature" which the Commission agrees should be excluded from consideration.

[2] A comparison of Chart B with the chart at the end of the Commission's brief, demonstrates the fact that the 5.5 factor is by no means a constant, but that the ratio itself varies with the price of the stock. That this fact is a logical result of the relationship between the two securities is pointed out in Judge Hand's opinion below (R. 123).

the company concede as much. Therefore, the only issue is whether it was permissible to appraise the 'warrants' as worthless." (Opinion below, R. 123) The Court of Appeals, per Learned Hand, C.J., correctly held that there was no "evidence 'substantial' or insubstantial to support the finding that these 'warrants' were wholly worthless." (R. 126)

The source of the Commission's error lay in its completely ignoring the significance of the fact that the warrants represent a *perpetual* option to acquire shares of the company's common stock. Their value in Judge Hand's language (R. 125), is "the result of a willingness to pay cash for the chance that the market [and the SEC's] judgment as to the future of the property may be too unfavorable." That chance is demonstrably a substantial one; and Judge Hand's conclusion from the undisputed evidence of a "long series of sales", "fortified" by "the prospective earnings of the new company", was that the Niagara Hudson Class B warrants have "substantial value". (R. 124) The SEC, although purporting to appraise the warrants, erroneously refused to "recognize" their value because it found that the common stock would not reach the call price of the warrants within the next 5 or 6 years. In other words, it arbitrarily treated *perpetual* warrants as though they were "mere short term" options. The Commission thereby shifted to the common stock a portion of the value, based on potential future increment, which this class (through the corporation) had previously carved out of its own equity and sold, for a valuable consideration, to the class of warrant holders.

Moreover, the claim of the Commission, that it does not know how to value warrants other than as short term options, cannot be taken seriously, since in *Electric Power & Light Corp.*, Holding Company Act Release No. 8889 at

70-74, aff'd, 176 F. 2d 687 (CA 2), stay denied, 337 U. S. 903, it used a fair market value formula to appraise perpetual option warrants which does justice to the perpetual call feature of such warrants and is appropriate here.

This does not mean, and the Court below did not hold, that the Commission is bound by the market price of the securities which it is its duty to value. In a reorganization where the market price reflects anticipations of the Commission's own acts, such a rule would be an absurdity. It does mean, however, that the Commission, like any other appraiser, must take into account the same factors which govern the behavior of willing buyers and willing sellers and so determine market price. The usual and approved method is to ascertain what prices similar securities normally sell for in the open market, discounting factors of a temporary, speculative nature. In order to eliminate such transient speculative factors, it is customary to take prices over a considerable period rather than on any single day. In order to determine what securities are comparable, a painstaking analysis of the earnings and asset position of the reorganized company is required, with particular emphasis on probable future earnings. These factors are considered by the Commission or other appraiser for the reason that they are the factors which govern value in the market place. It is the plain duty of the Commission as expert to put itself in the position of an intelligent and well-informed investor and to consider the evidence as he views it. Considerations of distaste or prejudice against any class or type of security must be put aside.

Thus the Commission, in appraising a preferred stock, estimates the future earnings and then computes the coverage of dividend requirements which will determine whether the stock is a prime investment or semi-speculative. It then goes to the market and ascertains whether preferred stocks

of similar quality over a reasonable and representative period of time have sold to yield 4%, 5% or 6%. With this data it is able to make a fair appraisal of the going concern value of such a preferred stock. Similarly, with a common stock, the Commission again estimates future earnings on the basis of available evidence and then goes to the market to see whether similar common stocks of other companies and in the same line of business with similar capital structures have normally been selling at ten times, fifteen times or twenty times annual earnings. The capitalization figure drawn from the market and applied to the Commission's earning forecasts determines the going concern value of the stock.

When it comes to valuation of option warrants the situation is somewhat complicated by the fact that such warrants do not produce income and so do not sell on a yield basis. Neither do they sell in the market on a times earning basis. Instead, they sell on the basis of the ratio of the price of the stock on which they are a call to the exercise or call price. Their value may thus be expressed as a fraction of the value of the stock on which they are a call. This fraction is not constant but varies with the price of the stock in such a way that the price movements of the warrants are less than those of the stock on an arithmetical basis, but more than those of the stock on a geometrical basis. Where the stock sells at or about the exercise price, such an option usually sells in the neighborhood of 40% of the stock price. Where the stock sells for half the exercise price, the option sells for a lesser fraction, usually about 20%. Where the options are unlimited in time, they never lose their market value completely, unless and until the common stock itself is wiped out. These are economic facts just like the fact that a well secured preferred stock sells to yield less than a poorly secured one. To ignore these facts and to extinguish

as worthless interests upon which the market would invariably place a substantial value, is a violation of the standards set up by Congress in the Act as interpreted by this Court and a deprivation of property without due process of law.

The Court of Appeals did not require, as it might and perhaps should have, that the Commission should follow the method adopted in the *Electric Power & Light* case, *supra*. It merely required that the appraisal be made in the light of the facts and not in their teeth. The decision is not based upon any "amorphous principles of colloquial equity" nor does it find compensable "the termination of an opportunity to make a profit by trading in otherwise worthless pieces of paper". Essentially what the Court of Appeals determined was that the Commission had not valued the warrants in accordance with legal standards. If the Commission is to have the sole right to set the standard, as well as to apply it, then it can extinguish any interest by its mere fiat.

ARGUMENT

Point I

The Court of Appeals Correctly Held That the SEC Committed Error of Law by Completely Ignoring the Perpetual Call Feature of the Option Warrants.

A. *The Rule of the Otis and Central Illinois Decisions.*

It is now authoritatively determined that, in a recapitalization proceeding under Section 11 of the Public Utility Holding Company Act, the SEC commits reversible error of law in "shifting investment values from one class of security to another by maturing contract rights which would not otherwise have matured." *SEC* v. *Central Illinois Securities Corporation*, 338 U. S. 96 (*Engineers* case); *Otis & Co.* v. *SEC*, 323 U. S. 624. The SEC has committed pre-

cisely this error. It was led into this error because it misconceived the true nature of the option warrant contract here involved, particularly its perpetual call feature.

B. *Nature of the Option Warrant Contract—the Critical Significance of the Perpetual Call Feature.*

The authorities are agreed that an "option warrant . . . represents something that has been taken away from the common stock". Graham and Dodd, *Security Analysis*, 2d Ed., 644-645; Berle and Means, *The Modern Corporation and Private Property* 151-152, 182; *Re Electric Power & Light Corp., supra* at 72; cf. *Merritt-Chapman & Scott Corp. v. N. Y. Trust Co.*, C. A. 2, decided November, 1950. The option warrant carves value out of the value of the common stock. We must, therefore, analyze the nature of the contract between the class of common stockholders and the class of option warrant holders, and in order to do so, we must first call attention to what constitutes the value of the common stock in a going concern immediately prior to the issuance of option warrants.

The common stock in a continuing enterprise represents the residual chance to make a profit (after all prior claims are satisfied). This opportunity encompasses two distinct elements: (1) anticipated earnings and (2) those earnings which cannot be foreseen but which may nevertheless eventuate. In a dynamic economy such as ours, the second is an important factor. This is brought home to us by Knight, in his classic treatise on *Risk, Uncertainty and Profit* (1921). As he points out, "Uncertainty is one of the fundamental facts of life" (346). This is intensified in a dynamic economy: "Progress involves uncertainty in a high degree" (312); and business cycles "enormously increase the uncer-

tainty of business operations", (336). Indeed, it is this phenomenon of the *unforeseeable* that produces pure profit:

> "Profit arises out of the inherent, absolute unpredictability of things, out of the sheer brute fact that the results of human activity cannot be anticipated and then only in so far as even a probability calculation in regard to them is impossible and meaningless". (311)

Only if we bear in mind the crucial fact that the value of the common stock depends on both factors—anticipated earnings and the chance that unforeseen earnings may be realized—can we understand the essential nature of the bargain made between the two classes of securities when the corporation issues stock purchase option warrants. Immediately prior to the issuance of the warrants, the market price of the common stock reflects its entire value; the value of the anticipated earnings and the value of the chance to make unforeseen earnings. What then is the bargained-for value of the warrants upon issuance at a call price *higher* than the market price of the stock? Certainly, it cannot represent any of the value inhering in the foreseeable earnings. This is fully reflected in the lower, prevailing market price of the stock. Thus, in *Ecker* v. *Western Pacific R. Corp*, 318 U. S. 448, 476, a railroad reorganization under Sec. 77, this Court, per Mr. Justice Douglas, pointed out that the "reasonable"—that is, prospective earning power of the carrier is "exhausted" by the securities, other than warrants, which it issues.

It is therefore clear that the warrants, upon their issuance at an option price exceeding the market price of the stock, reflect a portion of the second element of value, that inhering in the chance—always significant in our dynamic economy—that a going concern will realize now unforeseen earnings. As this Court put it in the *Ecker* case, *supra*,

warrants reflect a "mere possibilty" of earnings. Dewing states the point tersely: warrants constitute "the right to participate in *problematical* future profits". *Financial Policy of Corporations*, 4 ed., 1941, vol. 1, at 256 (italics added); cf. Graham & Dodd, *supra*, 1st ed., at 547 and 550.

The contract between the respective classes of common stockholders and stock purchase option warrant holders, which must be respected in Section 11 recapitalizations, should now be plain. This contract entitles the warrants to share in unanticipated earnings which, when they become foreseeable, push the market price of the stock beyond the level of the option price at which the warrants can be exercised. Immediately upon issuance the warrants then have no exercise value but are nevertheless valuable; this value, which they concededly do have at that point, has been variously named: e. g. "trading value" or "premium value" See e. g. 4 So. Calif. L. Rev. 269, 271, Wiesenberger, *Investment Companies* (1946 ed.) 95-100.

Thus the contract stands at the moment of issuance of the warrants. Let us consider the contract in operation where the issuing corporation remains a going concern. Earnings not anticipated when the warrants were issued are in fact realized or become reasonably foreseeable in amounts which enhance the value of the stock, raising it above the exercise price of the warrants. The warrants then acquire what has been called an "exercise value". But this exercise value is in addition to, and not instead of, their original value. They retain a premium value measured by their original and continuing contract right to share in further unanticipated earnings of the going concern.

This contract right continues, while the enterprise continues, so long as the option has not expired and whether or not the warrant has yet succeeded in acquiring an exercise value. A particularly significant feature of the Niagara

Hudson warrants must be noted here. They are *perpetual* options. In other words, even though they do not have a present exercise value they have a present premium value measured by their contract right to share in unanticipated earnings which may be earned at any time in the future, in perpetuity.

We take it to be conceded by the SEC that it cannot nullify either the exercise value or the premium value of warrants. In the *Electric Power and Light* case, *supra*, at 72-74, the Commission pointed out these two distinct value elements in the warrants there involved and held that it was required, in a Section 11 recapitalization proceeding, to give effect to both. On appeal to the Second Circuit, the SEC brief (27-28) summarized its position in this connection as follows:

> "As to the fairness of the participations between the holders of the common stock and the holders of the option warrants who are entitled in perpetuity to receive the shares of Electric's common stock at $25 per share, appellants contend the Commission erred in according value to the perpetual feature of the warrants. The Commission fully discussed this problem at pages 72-74 of its opinion. Appellants' contention involves a repetition of contentions rejected by the Supreme Court in *Otis & Co. v. SEC*, 323 U. S. 624, 637-638 (1945), which held that rights are not matured by operation of the Act and must be measured on a going-concern basis in order to prevent a windfall to one class of security holders at the expense of another. Accordingly, the Commission was required to give proper recognition to the right of the warrant holders to share with the common stockholders in any increment of value in excess of $25 per share of common *which might be realized at any time in the future*. This right represents an everlasting potentiality of dilution of the interests of the common stockholder, who under the *Otis* decision cannot employ the reorganization which the

> Act requires to relieve himself of this burden without fair compensation to the option warrant holder." (Italics supplied.)

This Court of Appeals, approving this reasoning, affirmed the orders of the SEC and the District Court. *Re Electric Power & Light Corp.*, 176 F. 2d 687 (CA 2). This Court refused a stay, 337 U. S. 903.

C. *The SEC Committed Error of Law by Refusing to "Recognize" the Admitted Value of the Perpetual Call Feature of the Niagara Hudson Warrants.*

The SEC was aware of the evident inconsistency between its decision in the *Electric Power & Light Corp.* case, *supra*, and its action here. In its Niagara Hudson opinion (R. 80, footnote 59), a reconciliation was attempted:

> "We recognize that the holders of the option warrants have a right to purchase common stock at any time, and that this perpetual feature has some present value no matter how remote or speculative the exercise of the right might be. The value to be accorded that right, however, in this case, is so small that as a practical matter we would not be justified in recognizing it for the purposes of a Section 11 reorganization. Cf. *Electric Power & Light Corporation*, — S. E. C. — (1949), Holding Company Act Release No. 8889.

This footnote reflects the qualification stated in the *Electric Power & Light* Findings and Opinion, *supra*, that the perpetual feature of a warrant has a value "that must be given appropriate recognition under the circumstances of this case where there is the probability of the market price of Electric's common stock exceeding the exercise price of the warrant within the foreseeable future" (74).

In other words, the SEC admits that the Niagara Hudson option warrants necessarily have value because of their

perpetual call feature, just as the Electric Power & Light warrants necessarily had value for the same reason. It takes the position, however, that it is not required to "recognize" this value unless, in effect, it can foresee that the market price of Niagara Hudson common stock will probably reach the call price within the period (whatever that may be) for which it is capable of predicting.

We assume that the SEC employs the word "recognize" in the sense of "measure". The alternative is that it is used in the same sense as in the phrase, "the United States Government did not 'recognize' the Soviet Government." The latter use, while reflecting the SEC disapproval of warrants in principle, implies a power which the Commission cannot claim.

The contention that there are values which the SEC is not called upon to measure is, however, equally untenable, at least where the alternative to measurement is extinction without compensation. It is granted that the Commission could avoid the necessity of measuring the value of the option warrants if it were willing simply to permit them to continue outstanding. Such action would be entirely unobjectionable to the respondent.

Assuming, however, that the SEC will persist in its determination that the elimination of the option warrants is "necessary" under the Act,[3] its duties are unmistakable. It must allocate to the security holder either cash or new securities which are "the equitable equivalent of the rights surrendered". *SEC* v. *Central Illinois Securities Corp.*, *supra*, at 143. If cash is given, "the question to which the Commission seeks the answer is, 'How much money would it cost the preferred stockholders to replace their securities

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[3] This determination is inconsistent with its decision to create a class of convertible stock. *Vide infra*, p. 37.

with comparable ones?' " *id.* at 144.[4] Where not cash but new securities are given, the test, while different in the details of operation, remains essentially the same. The proper procedure, in the event that it is desired to give new securities rather than cash, is simply to follow the method and formula employed in the *Electric Power & Light* case.

The SEC, in determining whether or not the option warrant holders can be allowed any participation has refused to apply the "fair equivalent" test laid down by the Supreme Court, for surely the Commission would not contend that the option holders could buy comparable securities, such as Tri-Continental warrants,[5] with the "equitable equivalent" the Niagara Plan so generously grants to the option holders.

D. *The Substantial Value of this Perpetual Right Cannot be Ignored*

The SEC has laid down a very simple test to determine whether or not a perpetual option warrant has "recognizable value": unless the common stock, at the time of the approval of the plan, is worth the option price—or very close to it—the warrant has no "recognizable value". It is this proposition which the Court of Appeals correctly found there was no "evidence 'substantial' or insubstantial to support." It is this test which the market history of these warrants *and all other warrants* unequivocally refutes.

In *Electric Power & Light Corp., supra*, the Commission employed what is the only feasible method for measuring the value of perpetual option warrants: it reviewed the market history of the common stock and the market history

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[4] Schedule II at the end of this brief sets forth the prices of the more comparable option warrants.

[5] See Schedule II, *infra*.

of the warrants and calculated the normal ratio of the two prices, at levels such as then prevailed; this ratio was then used, with an adjustment, to determine the value of the warrants. The Commission and the Court of Appeals both rejected the contention of common stockholders that the warrant holders were entitled only to the exercise value of the warrants, i.e. the market price of the stock less the option price.

The Commission takes the position, however, that the *Electric Power* test should be employed only where the value of the common stock exceeds, or at least closely approaches, the option price, this despite the fact that this test takes into full account, in its operation, the difference between the market and the option price. No reason is given for the rejection of the *Electric Power* test in other cases; the Commission simply disagrees with the standard of value which governs in the market place and has asserted the right to supersede that standard by a new one of its own creation. The market places a value on a perpetual right to buy a stock at two, three, four or five times its current market price; the Commission says it is worthless and by its *ipse dixit* undertakes to make it so.

It must be kept in mind that warrants, unlike stock, do not sell on a yield or "times earnings" basis. They are not bought for income but represent, in the words of Learned Hand, C.J., (R. 125) ". . . a willingness to pay cash for the chance that the market's judgment as to the future of the property may be too unfavorable". This chance, to be valuable, need not be "probable" in the sense of more than 50% probable—as the Commission uses the word. In the nature of things it cannot be "reasonably foreseeable", for if it were, it would be reflected in the price of the stock, which would approach the option price. By requiring, as a test of any value, a "reasonable expectation" that the mar-

ket price of the stock will exceed the option price within the "foreseeable future", the Commission denies warrant holders, *by definition*, any premium value.[6] This self-defeating test is error of law.

The ever-present possibility that "reasonable expectations" will be exceeded and the fact that so little of the future is foreseeable give premium value to the warrants. The right of the warrant holders to share in earnings not now foreseen may not be disregarded particularly where such right exists in perpetuity, because our economy is dynamic and unpredictable.

To indicate how substantial this right is, see Knight's authoritative analysis, *supra*, of the critical dependence of profit on the dynamic, the uncertain, the unpredictable. As Graham and Dodd note (*supra*, at 547), the value of warrants depends "upon the prospects of change rather than upon stability". Change limits the scope of predictability and enhances the chances of error in our forecasts. Our economy today is more subject to change, less subject to accurate, long-range predictions than ever before.

The Commission argued below that it did measure or attempt to measure the value of the warrants but found "that the value of the warrants, if any, is not susceptible of measurement by any rational basis and must be considered *de minimis*".

We do not pretend to know what a sum too small to be measurable is. If such a statement has any logical meaning, it can only be that the value of the entire class is "nominal". If it has any greater value, the SEC

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[6] What the warrant holders are to be compensated for is not "the impossibility of proving that a rational forecast is infallible" (Brief, p. 20); it is not even the not-to-be-disputed certainty that all forecasts are fallible. It is the certainty that a forecast for three or four years is not good for perpetuity.

admittedly is required to "recognize" such value and give compensation for it. The question then arises, assuming that the SEC intended to find that the entire class was worth less than 6 cents, or $6, or even $15,000,[7] is there any substantial evidence to support such a conclusion? Is the evidence to which the Commission's brief refers pertinent to such a finding?

The SEC took a great deal of testimony concerning the value of the common stock of Niagara for the present and "presently foreseeable future". It never found a value, but we understand that it does not question the current market value of about $16 per share as being very conservative. It did find that an increase in price of about 40% within the next 3 to 6 years was probable—sufficiently probable to base the terms of the conversion and call prices of the preference stock of the new company on the assumption that such a price for the common would probably be reached or exceeded (R. 76-77). The Commission simply refused, however, to predict that the price of the stock might ever increase further after the end of that 6-year period, thereby in effect converting perpetual warrants into options terminating in six years. From the proposition "We cannot predict that a price equivalent to $42.86 per share will be reached", the Commission then drew the conclusion, "Therefore a perpetual option to buy a stock at $42.86 per share is worthless!" This conclusion is a patent *non sequitur*. To give value to such an option, it is not necessary to predict that the stock *will* within any reasonable or unreasonable period reach the option price; it is merely necessary that there be willing buyers who will

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[7] In the *Electric Power & Light* case the SEC "discounted" the normal market value of the warrants by 21.7% for "speculation." A similar discount here would leave a value of about $1,200,000. Even a 99% discount would leave a value of some $15,000, which, we assume, is not "nominal."

pay for the real potentiality that the stock *may* reach the option price.

Ultimately we come down to a play on the word "probable". The arguments of the SEC go, if anything, to support the following proposition: "The probability that the market price of Niagara Hudson common stock (or its equivalent) will justifiably reach $42.86 per share within the next few years is less than 50%". Assuming, *arguendo*, the correctness of this proposition, we reject it as irrelevant to the conclusion that the value of the entire class of option warrants is "nominal". To sustain that conclusion, it would be necessary to support by substantial evidence the following proposition: "The probability that the market price of Niagara Hudson common stock (or its equivalent) will *ever under any circumstances* exceed the option price of $42.86 per share is *infinitesimal.*" But clearly there is not even a scintilla of evidence to support this proposition, nor in the nature of the facts of this case could there be such evidence.

In order to find the probability that the stock will ever exceed the option price to be infinitesimal, it is necessary to find the probability of each and every one of the following occurrences to be infinitesimal:

1. That by reason of inflation, the present general price level will ever increase by 25%.[8]

2. That the growth of Niagara Hudson which the SEC predicts for the immediate future will continue for any extended period.

3. That the Public Service Commission of the State of New York will some day give primary consideration to

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[8] That a 25% increase would be sufficient to more than double earnings; see Bauer & Gold, *Public Utility Valuation*, pp. 391-2.

reproduction cost rather than original cost in its rate-making policies.[9]

4. That many new and presently unanticipated uses for electricity and gas will be found in the future.

5. That substitution of natural for manufactured gas in the area served by the company will take place and will greatly benefit the company.

6. That atomic energy will some day be substituted for coal in the production of power, at tremendous savings to the company.

7. That the consumption of electric power will ever greatly exceed that which can be forecast with reasonable certainty today.

8. That the company will retain a considerable proportion of its earnings, which will be reflected in gradual appreciation in the value of its stock.

9. That the area served by the company will grow in population and become more heavily industrialized.

10. That the St. Lawrence waterways project will be put into effect, benefiting the area served by the company.

11. That a public authority will ever acquire the company's properties and pay anything like their reproduction cost for them.

12. That common stocks of sound growing utility operating companies will some day sell again at 20 to 30 times earnings as opposed to today's level of 12 to 18 times.

13. That Ebasco's estimates of future earnings will continue to be approximately correct.

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[9] See Bauer & Gold, *supra*, at p. 155. The public utterances of the new chairman of the P.S.C. have already substantially enhanced this possibility. See e.g. New York Times Financial Section, November 15, 1949: "Feinberg Favors Mild P.S.C. Rule. . . . Official Sympathetic with Cost Problems and Rate Increase Requests."

14. That the SEC's estimates might be overconservative in this as in practically all cases.

15. That the company will continue in business until the occurrence of any one of the foregoing.

16. That any combination of any elements of the foregoing or any other circumstances will ever raise the price of Niagara Hudson common to the option price.

It is, we submit, self-evident that the probability of the occurrence of each of the foregoing is far from infinitesimal. These are substantial probabilities.

Who can say in today's explosive international and military situation that we will not have another serious inflation, raising prices and earnings to a new plateau and even by its own effects, bringing these warrants up to an exercise value? The Commission cannot blind itself to the fact that inflation inevitably accompanies and follows war.

Indeed, warrants first became popular when we were entering the inflationary cycle of the '20s (See 4 So. Calif. L. Rev. 269), and it is a commonplace among investors that one of the important functions of the warrant from the investor's point of view, based on its contract right to share in the company's unforeseen earnings, is *to serve as a hedge against serious inflation.* We buy insurance policies to protect against all kinds of uncertainties. The prudent investor with large sums of cash on hand or invested in bonds or other fixed-income investments is glad to pay a premium for insurance against basic inflation hazards in the economy. The warrant is precisely such insurance and the substantial premium investors will pay for it—included in its normal market price—constitutes part of its investment value.

It is unnecessary to enumerate the scientific possibilities which can greatly benefit this company. The impact of atomic energy in the field of electric power is something that

no one can begin to appraise. The possibilities of general adoption of air-conditioning, radiant heating, cooking by radar range, almost universal ownership of television sets and general electrification of the railroads are already on the horizon. These possibilities are far easier of prediction than the unanticipated changes that have actually occurred, in, say, the petroleum industry.

The SEC may say "We are not required to consider these imponderables", but where, as here, investors consider them and the market places a value upon them, the SEC is not justified in rejecting that market value simply because it is incapable of weighing accurately the factors on which that fair market price is based. Unless the Commission can say that these possibilities do not exist, that these probabilities are infinitesimal, it cannot ignore and reject out-of-hand the prices which willing buyers have always been found to pay for an opportunity to profit by these possibilities and probabilities.

The SEC has attempted to shrug off the fact that these warrants and similar warrants invariably have had substantial market value by characterizing many of the purchasers as "gamblers". The Wright Brothers gambled that they could make a machine that would fly. Henry Ford gambled on the future of the automobile. The United States Government gambled on the possibility that an atomic bomb could be made. Every man who ever drilled for oil gambled on striking it. The success of none of them was "reasonably foreseeable".

The whole position of the SEC is based upon a logical absurdity. It is that any probability which is not at least 50%—or possibly very close to it—is worthless and has no "equitable equivalent". By the same token, a term insurance policy for, say, 5 years on the life of a young man is worthless because it is not "probable" that a young man will die within 5 years and, if we may be pardoned for using

a gambler's simile, only a "ticket" on the favorite in a horse race has value, because it is not "probable" that any of the other horses will win.

The SEC has urged that it is not required to take account of "vague hopes or possibilities". It would be more accurate to say that because it cannot see over the horizon the SEC concludes that there is nothing over the horizon.

Indeed, as Judge Learned Hand pointed out (R. 124) the "conclusion" that the warrants have "substantial value" is "fortified" by the only expert forecast that was made, of the Niagara Hudson earnings during the next three years.[10] Ebasco, the leading expert in forecasting utility earnings, predicted the following earnings for Niagara Hudson after preferred dividends (Findings and opinion, Table VIII, R. 66):

1949	$17,506,000
1950	19,300,000
1951	22,415,000
1952	25,297,000

Translated into earnings per existing common share these figures are equivalent to:

1949	$1.58
1950	1.68
1951	1.99
1952	2.40

Earnings of $2.40 need be capitalized at the rate of only 17.86 times to produce the option price of $42.86: A price-earnings ratio of 17.86 is certainly not out of the question

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[10] It is important to keep in mind that the record nowhere contains any estimate for earnings for the period subsequent to December 31, 1952. Accordingly, it may be inferred that the Commission's crystal ball permits it to gaze only 3 years into the future. This may account for its inability to foresee earnings greater than those for 1948 which have already been surpassed.

for a soundly financed, growing utility operating company. Much higher ratios have prevailed and, in some cases, prevail today. The SEC cannot and does not characterize Ebasco's figures as those of a pipe dreamer or a gambler. Ebasco was the Company's expert witness, whose competence was unchallenged and whose opinion is respected even by the SEC. Its testimony is the principal evidence before the SEC. *The country's foremost expert in such matters has forecast earnings which can easily sustain the option price within three years.* And there is no evidence in the record from which a contrary conclusion could be drawn.

Indeed, the SEC apparently agreed with the Ebasco forecasts of operating earnings based on past experience (R. 70). Nevertheless, it simply disregarded the only substantial evidence before it—presented by adversaries of the warrant holders—and indulged in speculation on what the New York Public Service Commission would do to restrict the company's earnings.

As we have seen, if Ebasco's projections are correct, an increase in earnings sufficient to give a value of $42.86 per old share can be anticipated by 1953, even using the rate-base (original cost) of $400,000,000 assumed by the SEC plus additional plant at cost and a return thereon of 7% to 7.2% (R. 70). Yet an ever increasing number of regulatory bodies have appreciated the necessity of using reproduction cost in computing the rate base to assure the public utility plant required in the public interest. The reproduction cost of the Niagara facilities would obviously be well in excess of $600,000,000. A 7% return on that figure would increase earnings to $3.25 per old share, which even the SEC concedes would give an exercise value to the option warrants.

It is significant to note in this connection that the SEC's predictions have always been notoriously overconservative.

See Bilyou, *A Decade of Corporate Reorganizations under Chapter X*, 49 Col. Law Rev. 456 (April 1949). Conservatism may be laudable where its aim is to prevent bankrupt corporations from returning quickly to the courts, but it should never be a means of destroying investment values in a going concern. Bilyou's compilation does not take account of the hundreds of millions of dollars of investors' money that has been lost through the Commission's pessimistic appraisals under the Holding Company Act. Other millions have been saved as a result of delays which diligent stockholder representatives have secured. For example, the common stock of *Standard Gas & Electric Co.*, of which p. 24, footnote 15 of the Government's brief [11] speaks as having been declared worthless, has happily been resurrected and today sells for $10 a share, or more than $20,000,000.

The Commission seems not to share the view of Mr. Justice Reed of this Court that "a court of reorganization guards with equal solicitude the equity of stockholders and the priority of creditors". *In re Equitable Office Building Corporation*, unreported opinion of Mr. Justice Reed, August 6, 1946, granting a stay on application of stockholders.[12]

The Commission's persistent and repeated denials of any possibility of recovery during the present inflationary boom period constitutes a dangerous blindness for which appeal to the courts has been and can be only a partial remedy. Appraisals which consistently err on the side of

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[11] The other citations in that footnote have little bearing on the issues here. The other companies named in first paragraph seem all to have been bankrupt. The cases in the second paragraph appear to have been uncontested simplifications of subsidiaries, little if any of whose common stock was in the hands of the public.

[12] While SEC in the *Equitable* case supported the stay application, it adhered to its own finding that there was no equity for the common stock. The stockholders' equity today is worth in excess of $8,000,000.

overconservatism are every bit as destructive of real values as unduly optimistic estimates. The results are particularly disastrous because the security holders affected often lose, not a part, but their entire investment.

The Government's brief (at pp. 10, 13, 26 and 34) seeks to have this Court believe that the Commission took evidence, or made a finding, on the question of whether or not there was a perceptible *possibility* that the warrants would *ever* be exercised. It took no such evidence * and made no such finding. Nowhere in its brief does it advert to such evidence or finding. As the foregoing demonstrates, the evidence is all the other way and any such finding would be completely unsupported.

In its argument the Government subtly shifts its ground to a discussion of evidence that there was not a *reasonable probability* that the warrants would be exercised *within the foreseeable future*. The SEC's confusion of these two vitally different propositions makes its whole position untenable. See *Webster's New International Dictionary* (1921):

> Probable . . . 1. Capable of being proved. *Obs.*
>
> 2. Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely . . . "That is accounted *probable* which has better argument producible for it than can be brought against it". *South.*
>
> 3. Rendering probable; supporting or giving ground for, belief, but not demonstrating; as *probable* evidence; *probable* presumption.
>
> 4. Plausible; specious; colorable. *Obs.*

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* Cf. Footnote 10, p. 22, *supra*.

See also *Crabb's English synonymns* (Revised Ed. 1917) p. 151; "Chance, probability . . . These terms are both employed in forming an estimate of future events; but the *chance* is either for or against, the *probability* is always for a thing. *Chance* is but a degree of *probability;* there may in this latter case be *Chance* where there is no *probability.*"

E. *By Wiping Out the Perpetual Right, the SEC Has, Without Compensation, Given to One Class of Security Holders What They Sold to Another Class.*

The SEC concedes, as it must, that the test of values in Section 11(e) is different from the test ordinarily applied in bankruptcy reorganizations. The differences which the Court of Appeals found determinative of this issue in the instant case are clearly expressed by this Court in the *Otis* case. The Court said (323 U. S. at 632):

> "Furthermore, only by forced liquidation could the common stock be deprived of its *possibility* for future earnings . . . While recognizing that the common stock participation was remote, the Commission determined that in its 'over-all judgment' Power's common had a legitimate investment value . . ." (Italics added)

The Court continued, on page 633:

> "To petitioner, no distinction is to be drawn between liquidation under bankruptcy or reorganization and liquidation under the Public Utility Holding Company Act by virtue of Sections 11(b)(2) and 11(e)."

And on p. 638, the Court specifically said:

> "The reason does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of the power to simplify should mature rights . . ."

The SEC brief miscontrues the *Otis* case. The possible earnings referred to there were neither "probable" nor "reasonably foreseeable." The SEC uses these words to describe earnings which it believes can be counted upon safely.[13] The importance of the difference is pointed out in Chief Judge Hand's opinion (R. 125).

In re United Gas Corp., 58 F. Supp. 501 (D. Del.) aff'd. 162 F. (2d) 409, cited at note 12, p. 20 of the Government's brief, supports our position here, in that participation was there given to common stockholders despite a finding that "the present common's possibility of participating in earnings is extremely remote" (p. 518). The Niagara warrants are in at least as good a position as The United Gas common stock. See also discussion of the *Otis* case, *supra*. In view of that finding, and the fact that the common was "under water", Judge Leahy found there that option warrants which would give the right to purchase new stock at 22 to 33 times its current value were too remote. The option warrant holders did not appear and took no appeal. See also *American & Foreign Power Co.*, Holding Co. Act Release No. 7815, 7849 (1947).

In the *Otis* case, although the common stock was "under water", it was given a participation because its chance to share in the possible—note, not probable—future was held to have investment value. Interpreting this case the District Court said in the *Interstate Power Company* case, 71 F. Supp. 164, 168 (D. Del.) (cited at p. 24, note 15, of the Government's brief):

> ". . . It was conceded further that the possibility of the common stock acquiring value was very remote; yet, the SEC thought the common stock should have some participation even in the light of a possibility that

[13] Thus the "foreseeable" earnings of Niagara Hudson are $1.39 per common share, as against current earnings of $1.61.

> the estimate of future earnings might prove to be erroneous. On the date of the plan the company involved and the SEC hoped that many years distant the common stock would emerge from under water. In short, it was solemnly said that it was only legal cricket that the common stockholders should be given a chance to recoup, especially where the reason for the liquidation (or, i. e., reorganization) was purely fortuitous because of forced compliance with the Act and where the future condition of the new enterprise was based on a surmise; no one had prescience to envisage with exact certitude what would be the value of junior securities."

Under the *Otis* and *Central-Illinois* decisions, *supra*, the warrant holders cannot be deprived of their everlasting bundle of rights without fair compensation. To do so, as the SEC did in this case, is prematurely to foreclose their contract rights in contravention of the legal standards prescribed by the Act. Instead of protecting the warrant holders' investment, which the SEC must do under the Act, the SEC has completely ignored and destroyed it. By destroying it, the Commission, in plain contravention of the mandate of the Act, has handed over the warrant holders' property to the common stockholders—*the very contractual property which the class of warrant holders bought from the class of stockholders when Niagara Hudson issued the warrants.*

A very remote possibility was held to have substantial investment value in the *Otis* case. How then may the bargained-for, contractual, permanent right of the Niagara Hudson warrant holders to share in possible improved earnings be wholly ignored, as was done by the SEC?

While we do not concede that a class of equity securities can be wiped out in a Section 11(e) reorganization (or even in a Chapter X reorganization) where the corporation is

solvent, we need not argue this point here,[14] since the Commission has given a participation to the common stock of more than $200,000,000. The warrants cannot lawfully be deprived of the value of their contract right to acquire "a definite proportional interest in the common stock capital of the corporate enterprise." See *Merritt-Chapman Scott v. N. Y. Trust Co.*, and other authorities cited *supra* at p. 10. Where as here there is a substantial equity for the common stock, the warrant holders must be accorded their proportionate share of it. The fact that their share is less than 1% is not important in this case, where 1% amounts to some $2,000,000.

The SEC may have authority to prevent a holding company from floating warrants and also to compel the retirement of warrants already issued. But the SEC's extreme distaste for this class of of security has caused it to confuse the authority referred to with an authority it does not have —to liquidate these securities without compensation. The warrants under consideration have already been issued and lawfully traded in as valuable property. The Congress and this Court, as well as the Fifth Amendment, have forbidden destruction of such property unless compensation is awarded.

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[14] The Government's brief, at p. 24, implies that if a common stock can be wiped out, an option warrant can, *a fortiori*. Yet this does not follow; for the position of the common stock of a company which is not earning its preferred dividend is constantly deteriorating, while the position of a warrant in a company, such as Niagara, where there are retained earnings on the common stock is steadily improving.

Point II

The SEC Committed Error of Law by Failing to Apply the Appropriate Test of Value to the Option Warrants: Namely, Their Fair Market Value.

We have demonstrated that the SEC has completely ignored the perpetual call feature, thereby depriving the warrant holders of the benefit of their bargain. This is not the "fair and equitable" treatment prescribed by the Act. The SEC takes the position, however, that the only practical method of administering the provisions of Section 11 is to compensate warrant holders for their contract claim, if any, on "reasonably anticipated" earnings, giving *pro tanto* recognition to the option, but beyond this to ignore the perpetual call feature of the warrants.

In a legal sense, option warrant holders, as well as creditors and preferred stockholders, are "prior" to the common stockholders. They all have contract claims which determine the corporate residue represented by the common stock. The SEC here has treated the option warrants as if they, and not the common stock, were residual—as if the common stockholders were entitled to a certain amount (not stated) before the warrant holders' claims could be considered. It erroneously disregards the fact that the interest of the warrant holders was, at the time of their issuance, carved out of the stockholders' equity. *See supra*, p. 10, 11. Like the rest of that equity, perpetual option warrants can be extinguished only by bankruptcy or other liquidation.

Under the Act, the SEC can either: (1) leave the option warrants undisturbed, or (2) place a value on them, in dollars or in terms of a fraction of the equity which their holders share with the common stockholders. It cannot choose the second alternative, and then refuse to make the

required valuation on the ground that its ability to predict is inadequate to the task. In order to wipe out the Niagara Hudson warrants without compensation, the Commission must find as a fact, on the basis of substantial evidence, that the probability of the common stock's *ever* reaching the option price is zero. Any such finding, in this case, would be in glaring conflict with the facts.

The difficulties of appraising the Niagara Hudson option warrants are more apparent than real. The application of the method followed in the *Electric Power & Light* case is extremely simple. In Release No. 8889, at pp. 70-74, the SEC there solved the problem in a very practical and common-sense way: it held that the decisive measure of the investment value of the option warrants was their fair or normal market value.[15]

Niagara Hudson option warrants continuously had substantial market value until it was destroyed by SEC action. The record (R. 90) shows a definite historical relationship between the market prices of Niagara Hudson common and the option warrants. Although the stock has been substantially below the option price, the warrants persisted in retaining a substantial market value. As recently as 1946, when the common stock was selling for less than today's price, the warrants sold in the open market as high as 3⅜, representing an aggregate market value of almost $1,700,000. Niagara Hudson common now

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[15] The SEC made a 21% deduction there for what it called a speculative element but the SEC opinion makes clear that, in the main, the normal market value of the option warrants was deemed the fair and practical measure of their investment value for purposes of proceedings under Section 11. While the warrants in the *Electric Power* case were found to have nominal exercise value, the SEC held expressly that they also had a premium value which was entitled to recognition, and which was reflected in the market value. In fact, practically all of the substantial value accorded to the warrants there (⅓ common share) was attributed by the SEC to their premium value.

sells for close to $16,[16] or about ⅜ the exercise price. Great increases in value are no more unusual in utility stocks than in other stocks; see Schedule I at end of this brief. Indeed, the price of Niagara Hudson common stock doubled in 1949 alone and now is eighteen times its 1942 low. Under these circumstances it is plainly absurd to assert that the warrants do not have "recognizable value."

The Government takes great pains in its brief (p. 39 et seq.) to establish that the "great percentage increase" in the market price of Niagara Hudson common within the past few years does not necessarily prove that the common will repeat that performance. Needless to say, we do not contend that it does. All that is required is a further rise of less than 170% and the Government brief does not show such an increase is unlikely. We assume that the SEC does not mean that it is intrinsically unlikely that a stock selling as "high" as $16 should double or treble in value. If so, the examples of People's Gas Light & Coke, which has risen from a price of $22 a few years ago to a high of $139 this year, and of St. Louis & Southwestern common stock, which went from $1 per share a few years ago to a current level of $210, should be sufficient refutation. We note in passing that both of these companies are subject to rate regulation. We do not contend that just because the warrants once sold for $70.50 they will necessarily return to that price. We do point out that many of the factors which contributed to the volatility of Niagara Hudson stock in the past persist. Thus the common stock retains a high degree of leverage resulting from the fact that it represents only 16% of the total capitalization.[17] That the SEC recog-

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[16] Compare the 1950 "high" of 17⅛ with the 1946 "high" of 15.

[17] For the significance of this factor, see *Bauer & Gold*, op. cit. *supra*, pp. 391-2. For the 16%, see R. 75 and dissent of Commissioner McEntire at R. 92.

nizes the likelihood of further advances in the price of the common stock is evident from its own prediction of a probable rise of some 40% within the next 3 to 6 years (R. 61, 76-77). This prediction was made in spite of the Commission's purported rejection of Ebasco's estimate that earnings available for the common stock would rise more than 50% by 1952 (R. 66) and in spite of the Commission's habitual and notorious overconservatism.

The SEC errs in ignoring the simple facts that even the stocks of conservative operating companies have frequently and even regularly doubled and trebled in market value within periods of comparatively few years. It errs in assuming that the peaks and valleys that have always characterized market prices, earnings, yields and capitalization rates in the past will give place in the future to an unending, unvarying plateau. On this unrealistic, insupportable assumption alone it bases the extinction without compensation of a class of securities worth more than $1,500,000.

The market demonstrates the presence, and measures the amount of, the investment value of all warrants enjoying a perpetual option. The market recognizes and appraises the worth of warrants arising from the elementary fact that the future of a business enterprise is essentially contingent, that estimates of anticipated earnings are uncertain even as to the immediate future and do not pretend to guess at the earnings for more distant periods of time. The element of contingency is so great in our economy that the one thing we can be sure of is that no one can anticipate the long-run prospects. The SEC concedes this but fails to appreciate the consequence; namely, that since there is admittedly a chance that some day the common stock will exceed the option price and since the option will then still be in effect, the option has a current appreciable value. Of course,

there is no mathematically precise method of fixing that value any more than there is an exact process for determining any other value (Opinion below, R. 125-6).[18] Fundamentally, value is the price agreed upon by willing buyers and willing sellers. In the case of a preferred stock or any other property commanding an income, buyers and sellers will meet on a price determined primarily by earning prospects (see e. g. *People ex rel. Parklin Operating Co.* v. *Miller*, 287 N. Y. 126 (Opinion by *Lehman*, Ch. J.). It is for this reason that the SEC is permitted to use this test in appraising preferred stocks under Section 11 of the Act, *Central-Illinois* case, *supra*. In valuing option warrants, the basic objective must also be to determine what willing buyers will pay and willing sellers take for the warrants. But the test or *kind* of material evidence is necessarily other than prospective earnings in the reasonably near future that pertinent in the valuation of, let us say, preferred stocks, since option warrants—unlike preferred stocks and other securities—*do not purport to be, and are not traded in as, property now commanding an income.* Since this species of property is desired by owners for a reason other than its ability to command earnings now or in the near future, is it not the height of absurdity to

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[18] See also *Commissioner of Internal Revenue* v. *Marshall*, 125 F. (2d) 943, p. 946 (CCA 2) per *Frank*, Circuit Judge:

> ". . . The fallacy in the argument stems largely from lack of recognition of the ely character of the word 'value' . . . The truth is that it has different meanings in different contexts, even in the restricted field of 'tax law'. And there, as almost always, 'value' involves a conjecture, a guess, a prediction, a prophecy.
>
> ". . . No one can foretell what changes in technology will do to the earnings of any business. Anyone who wants to eliminate uncertainties from 'value' will have a sad time getting along in this world. All aspects of living are chancey. We cannot by use of a symbol, 'value', convert the risking into risklessness, Canute restless change out of existence."

Also *Andrews* v. *Commissioner of Internal Revenue*, 135 F. (2d) 314, 317 (CCA 2).

appraise it, as did the Commission here, in accordance with whether it can now or will in the near future be able to command earnings! If a building is uniquely adapted for and wanted as a stock exchange, the courts will refuse to value it at a price that others not wanting it for this use would pay for it. *People ex rel. N. Y. Stock Exchange* v. *Cantor*, 221 A. D. 193, aff'd, w. o. opinion, 248 N. Y. 533. If a plant is uniquely adapted for and wanted as a dairy plant, the courts will not value it as though it were ordinary commercial space. *People ex rel. Sheffield Farms Co.* v. *Mills*, 82 N. Y. Sup. 2d 337. Property must be valued in the light of its appropriate uses. The SEC has applied to option warrants a test of value which ignores their essential nature and purpose. The only appropriate method in the case of option warrants is to ascertain directly what they trade for over substantial periods. Option warrants such as those here in question clearly have a substantial value when measured by the test appropriate to them, namely, their fair or normal market value.

The SEC recognized in the *Electric Power & Light* case the anomaly of valuing option warrants in terms of earnings or yield. The value of option warrants represents nothing more or less than the market's appraisal of the possibility of an increase in the value of the stock beyond the level justified by *presently* foreseeable earnings. Accordingly, the SEC in that case took market value—not just current market, but fair market value.

The instant type of appraisal is not essentially different from that which takes place under statutes requiring appraisal of the stock of dissenting stockholders on a merger. There "fair value" is considered to be not less than "fair market price." See e. g.: *Matter of Fulton*, 257 N. Y. 487, 493 (1931); *Matter of Marcus*, 273 App. Div. 725 (1st Dept. 1948), appeal denied 274 App. Div. 822.

The Commission here says that it can ignore or reject market values. But it should be noted that all of the tests concerning earnings and normal prices—earnings ratios are nothing but abstractions and generalizations from the market. The SEC cannot appraise without considering the market. When it finds that a given preferred stock should sell to yield 5%, or a given common at 12 times earnings, it judges only by a comparison with the market prices of similar preferred and common stocks. Why then is not the same test applicable here? If the SEC wishes to check the market price of the Niagara Hudson option warrants, why does it not go to the market and see what other comparable warrants normally sell for? We do not argue that the Commission is bound to accept the market price of these particular warrants; we do say that *it cannot ignore all market values of all warrants.* That is exactly what has been done. The SEC doesn't approve of warrants—it calls them "deceptive securities". Accordingly, it takes it upon itself to ignore the *undisputed fact that any perpetual option warrant, to buy any common stock at 2.65 times its current market value, always has a substantial, measurable market value.* The SEC has no more right to ignore this fact than to ignore the fact that utility preferred stocks always yield more than United States Government bonds. It is the Commission's job to find out what a value *is*, not what it would like the value to be. Otherwise it could say: "this preferred stock is so good it will sell to yield 2¼%, just like a United States Government bond." Or it could say—as it refused to say in the instant case—that a second preferred stock of Niagara Hudson is just as valuable as its first preferred stock. To say that a perpetual option to buy Niagara Hudson common at 2.65

times today's market, has no value whatsoever, or no "recognizable" value, is just as arbitary and capricious.

For Niagara Hudson's option warrant holders to replace those warrants with comparable securities will cost them at least $1,500,000. If the warrants are to be eliminated, they are entitled to that much, whether in cash or in securities. This Court, in the *Central Illinois* case, did not say the security holders should receive cash equal to what similar securities *ought to cost*. The test is what similar securities *do cost*.

The SEC can ignore temporary speculative factors influencing the markets. It cannot ignore permanent, long range market relationships, simply by saying loftily that the market in a certain type of securities is only one gambler gambling on what other gamblers might pay. If this Court approves this attitude, the SEC can ignore all market prices, simply by dubbing them "speculative". Obviously, any one who buys any stock, not intending to hold it for eternity, is speculating that when he wants to sell it, others will be willing to buy it. Otherwise, he would be a fool to buy.

The SEC may not decline to measure the true value of an option warrant by employing a novel and arbitrary test of value. It must appraise it in the same way as it is or would be appraised in a free market, unaffected by considerations introduced by the Act. It may not ignore the appraisal of a free and active market of twenty years standing. It may show why that market appraisal is out of line, by reason of abnormal or temporary conditions. But if that appraisal is in line with the price of other similar securities, it cannot be ignored.

When the SEC decides that a common stock is worth ten times a normal years' earnings, or that a well-secured preferred stock should sell to yield four and a half percent,

it does not make these figures up out of thin air. It examines the *market*, over a period of years, to determine what the capitalization rate or the yield *normally* is. If it found that the capitalization rate is normally twenty times, and applied a rate of ten times, or if it found that similar preferred stocks yielded five percent, and applied a rate of three percent, its action would be arbitrary and unenforceable. So it is here. It may not find that 2 plus 2 equals 5. Neither may it find that $1,500,000 equals 0.[19]

The SEC is ordinarily deeply concerned about market values (R. 79, footnote 52a). In this very case it was persuaded that the Class A stock allotted to the Niagara Hudson preferred stockholders would temporarily sell in the market for less than its "investment value". The Commission undertook to compensate them for this "market hardship" by approving the conversion feature of the Class A stock (R. 60). This conversion feature is of course essentially the same as the warrants they have found it necessary to eliminate as an "undue complexity" (R. 94). The complexity of course remains under the Plan; it has merely been taken away from its rightful owners, the warrant holders, who are left with nothing, and given to the preferred stockholders as a "sweetener" (R. 60, footnote 20). The injustice of this shifting of investment values is manifest.

The terms of the conversion feature attached to the Class A stock do, of course, differ from those of the option warrants. The price is lower and the right is not perpetual but expires in six years. But the question remains: If it could be done to compensate the preferred stockholders

[19] The test of normal market value, applied in the *Electric Power & Light* case, sets the value per Niagara warrant at 2/11 common share. The price of the common being $16, the value per warrant is about $3. This figure multiplied by the almost 500,000 warrants outstanding, produce $1,500,000 for the class.

for a temporary, partial loss of market value, why could it not be done to compensate the warrant holders for a permanent and total loss of market value?

We recognize that a perpetual option may be regarded as a more serious "complexity" than one for six years. Accordingly, we would not object if, in place of perpetual warrants, new warrants limited in time were to be substituted, provided that the option price were lowered sufficiently to compensate for the abbreviation.[20] To do this is clearly unobjectionable in principle, and it is the form of relief preferred by the respondent. The SEC has, however, the alternatives of giving in place of each option warrant about one-fifth of a share of common stock, or about $3 in cash.

The market value of an option warrant is determined as a fraction of the market value of the stock on which it is a call. What that fraction is depends mainly on the ratio of the price of the stock to the option price. Within a given range, the fraction is substantially fixed. It varies little from time to time, so that if the price of the stock is known, the normal price of the option warrant can be computed with surprising certainty. In the case of Niagara Hudson, while the stock is within its recent range, the normal ratio is 1 warrant equals about 2/11 share.

Chart A, at the end of this brief, gives the annual mean prices of the common stock and of the option warrants from 1932 until 1948, the last full year of trading. It shows that the normal ratio of 1 share equals 5½ warrants prevailed whenever the stock sold in its recent range, although, at current prices, a ratio of 1 to 4½ is fairer. This normal market relationship persisted in the fact of the declared hos-

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[20] Such a provision was embodied in a plan recently filed with the SEC by United Corp.

tility of the SEC until 1949[21] when the Commission announced its intention of wiping out the option warrants.

The mean figures in the Chart were taken only as being fairest and most representative; calculations based on annual "highs", justifiable from a warrant holder's point of view, would show a more favorable correlation. At the risk of "leaning over backwards," this Chart presents only the "normal" price relationships. These have been so unvarying and persistent here as to render ridiculous the Government's suggestion (Br. 34-35) that they are the result of trades between "gamblers".[22]

The Charts at the end of this brief are not intended to show that there has been any absolutely fixed relationship between the market prices of Niagara common stock and prices of the warrants. All that the Chart at the end of the Government's brief shows is that the ratio fluctuates with the price of the securities themselves.[23] But Judge Learned Hand has explained why this is so (R. 123). Surely the Commission does not seriously contend that the parallelism

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[21] The disproportionate decline in the price of the warrants which took place in 1947 may be attributed to SEC Holding Co. Act Release No. 7615, declaring the Commonwealth & Southern option warrants worthless.

[22] At this point, in footnote 19, the Government suggests an analogy between the market prices of these warrants and those of Russian Imperial Bonds. While we do not wish to be drawn into a discussion of the merits of such obligations, we consider it self-evident that in today's international situation the possibility of a change in the regime governing Russia to one more likely to honor that country's debts, while not a "reasonable expectation . . . within the foreseeable future" is a real and "rational" possibility. In any event we believe that this Court would view a taking of those securities without compensation as a violation of the Fifth Amendment of the Constitution. That the Commission's extinctions of the Niagara Hudson warrants—with their much greater prospects—is confiscatory, follows *a fortiori*.

[23] The "peak" on March 31, 1943 shown on that Chart is obviously due to temporary speculation on that date. The use of annual mean prices, instead of the prices on forty-four days, minimizes such anomalies. See p. 3, note 1, *supra*.

in the price movements of the two securities is mere coincidence. Yet this is what it must argue if it wishes to support its suggestion that the prices paid for the warrants represent gambling, pure and simple, and that the purchasers were speculators dealing in pieces of paper which they hoped later to sell to other speculators at higher prices. In footnote 20 (Brief p. 35) the Government points out in fact that there is such a connection between the market prices of the securities—that persons who were optimistic with respect to the prospects of the stock sometimes bought the warrants instead, in order to obtain a proportionately higher return in the event that their forecasts were correct. Such behavior can hardly be characterized as irrational or unfounded upon economic fact.

Whether or not those who bought the warrants did so with the intention of holding them until they could profitably exercise them, is totally irrelevant—as well as outside the record. The fact remains that the higher the price of the stock, the greater and nearer the possibility of ultimate profitable exercise of the warrants becomes; this possibility has a substantial market value even though its materialization within the "foreseeable future" may be less than a 51% probability.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

T. Roland Berner,
M. Victor Leventritt,
Aaron Lewittes,
Counsel for Respondent.

November 25, 1950.

SCHEDULE I

Sample List of Public Utility Security Prices Which Increased by More Than Six Times in a Four-Year Period

	1942 Low	1946 High
American Cable & Radio	1 1/8	17 1/4
American & Foreign Power Com.	9/32	14 1/4
American & Foreign First Pfd.	18 7/8	129 1/4
American & Foreign 2nd Pfd.	1 1/2	44 1/8
American Power & Light $5 Pfd.	12 1/2	123 1/2
American Power & Light Com.	1/2	22 1/2
Baltimore Transit Pfd.	4	55 5/8
Central Public Utility 5 1/2/52	3/8	30 1/2
Central States 7% Pfd.	.05	166 1/2*
Central States 6% Pfd.	.03	52 3/8*
Columbia Gas	1	14
Commonwealth & Southern	3/32	5 3/4
Eastern Massachusetts St. Adj. Pfd.	2 5/8	47
Electric Bond and Share	7/8	26 3/4
Engineers Public Service	1 1/4	41 1/2
General Public Service	1/8	7 3/8
Illinois Power	5/16	39 1/2
International Hydro A	1/4	15 1/2
International Hydro Conv. Pfd.	1 1/4	73 1/2
International Power Lt. Com.	2	60
International Tel. & Tel.	1 1/2	31 7/8
Iowa Public Service	1 1/2	24 3/4
Kansas City Public Service	1/8	3
Middle West Corp.	2 3/4	31 7/8
New England Public Service $7 Pfd.	6 1/2	168 1/2
New England Public Service Com.	.10	12 1/8
Niagara Hudson	7/8	15
North American	6 1/2	39 3/4
North American Light & Power	1/16	12 1/2
Northwest Utilities 7% Pfd.	6 7/8	184
Northern States Power (Del.) A	1 7/8	73 1/2
Oklahoma Railway Inc. Bonds 1990	1/2	81
Penn Gas & Elec. A	1/8	9
Penn Gas & Elec. $7 Pfd.	1/2	50 3/4
Southern Union Gas Com.	1	42 1/2
Standard Gas $6 Pfd.	5 1/8	135 1/2
Standard Gas $4 Pfd.	3/4	60 3/8
Standard Gas Com.	5/32	8 1/4
Standard Power Pfd.	12	160
Standard Power B	1/32	7 3/4
Wisconsin Electric Power	2	23

* All entries taken from Moody's Public Utility Manual 1948 except for those asterisked which were taken from Moody's Banks and Insurance Manual 1948.

SCHEDULE II

Range of Market Prices in 1949 of Perpetual Option Warrants and Common Stock Most Comparable to Niagara Hudson Corporation.

	Terms	Stock High	Stock Low	Warrants High	Warrants Low
Merritt, Chapman & Scott	1 sh. at $30	23½	18	6	2¾
Tri-Continental	1.27 sh. at $17.76	9¾	6¼	3⅛	2⅛
*United Corp.	1 sh. at $27.50	5	2½	7/16	⅛

* Plan pending under § 11(e) of the Act.

CHART A

44

ANNUAL MEAN PRICES NIAGARA HUDSON COMMON STOCK AND WARRANTS

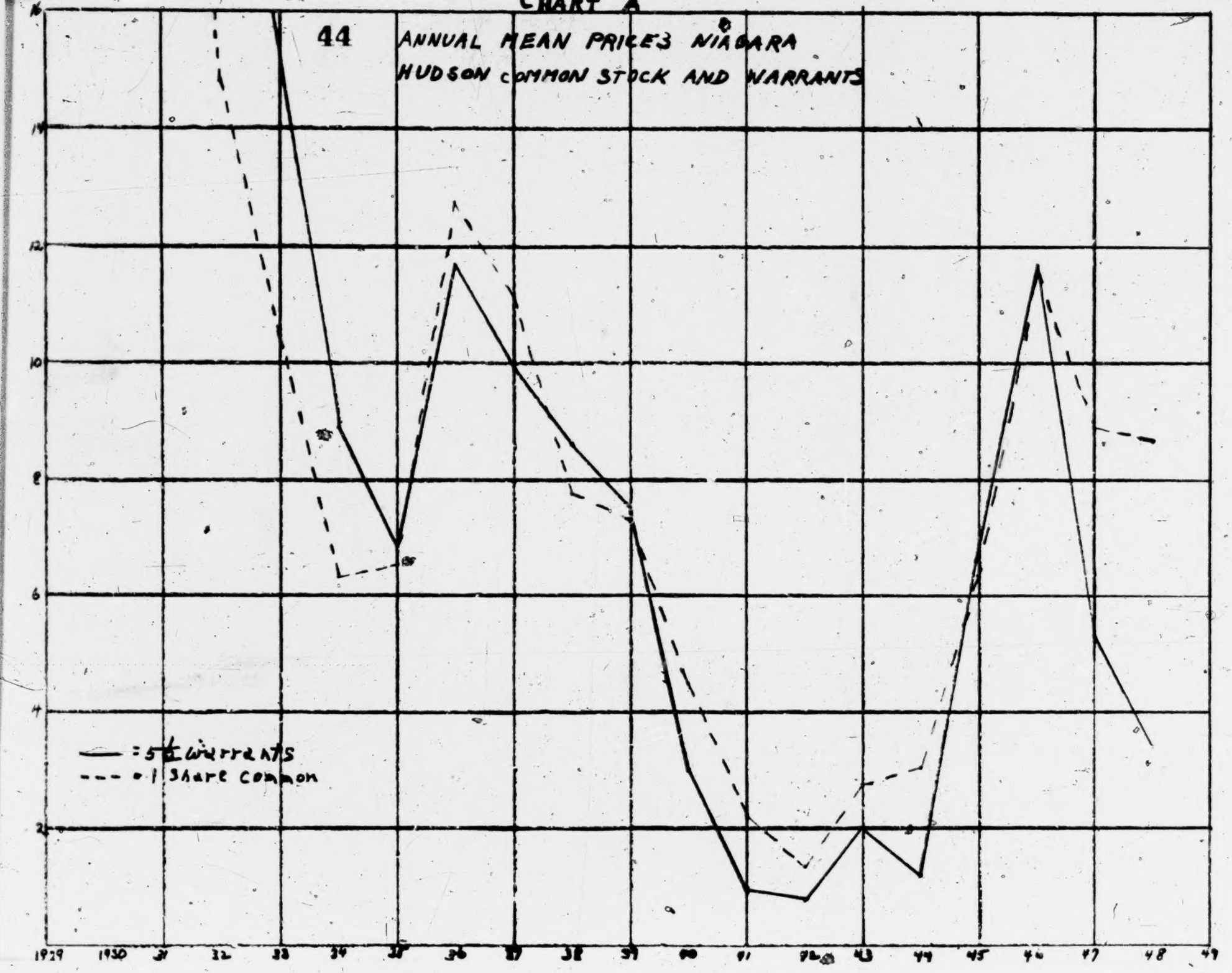
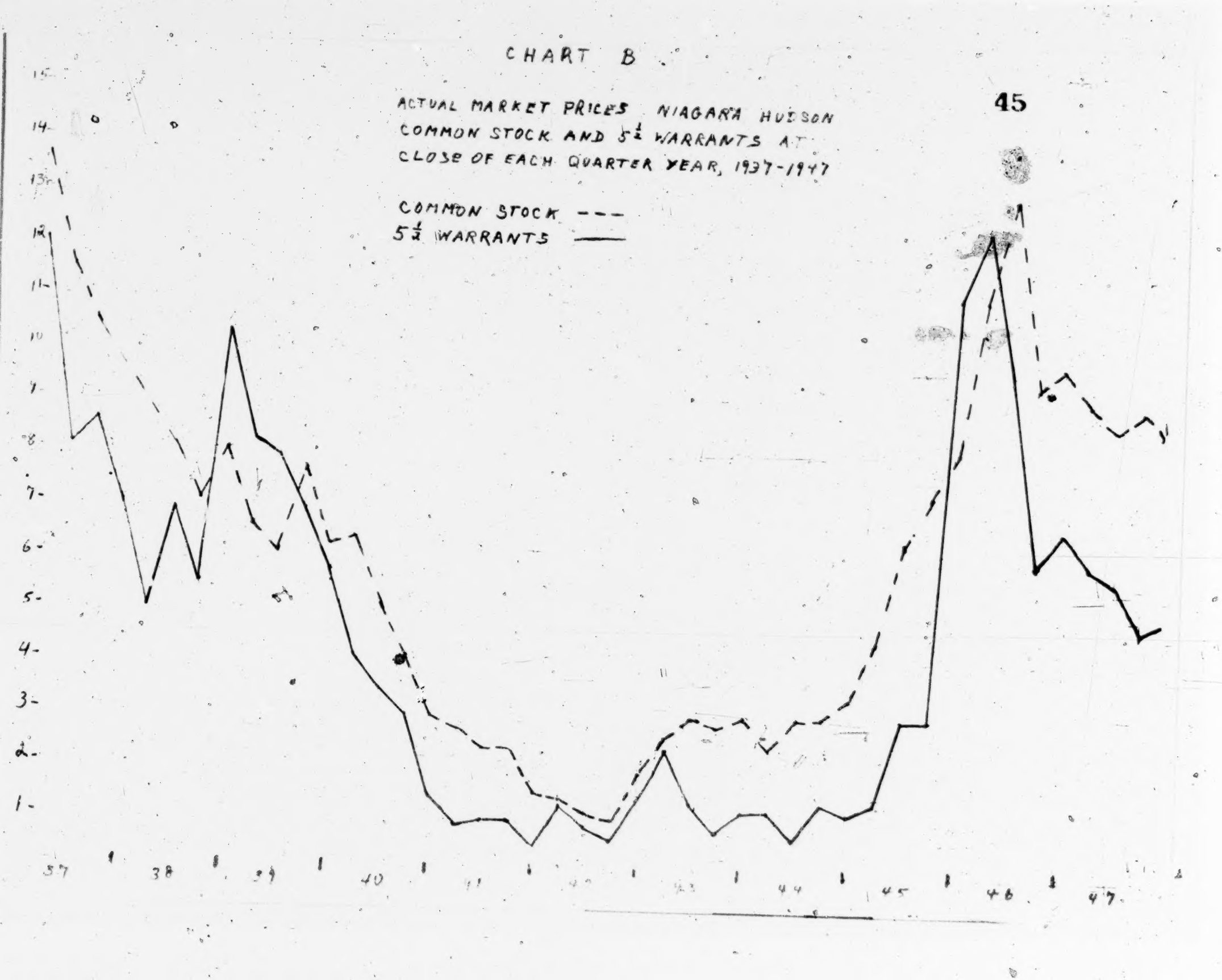


CHART B

ACTUAL MARKET PRICES NIAGARA HUDSON COMMON STOCK AND 5½ WARRANTS AT CLOSE OF EACH QUARTER YEAR, 1937-1947

COMMON STOCK ---
5½ WARRANTS ——



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No. 212

In the Supreme Court of the United States

OCTOBER TERM, 1950

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

M. VICTOR LEVENTRITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 212

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

M. VICTOR LEVENTRITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

This memorandum is submitted in order to bring to the attention of the Court the decision of the Court of Appeals for the Third Circuit in *In the Matter of The Commonwealth & Southern Corp.*, on August 23, 1950, reprinted as an appendix hereto, *infra*, pp. 5-14. That decision creates a clear conflict with that of the Second Circuit in the instant case.

Like this case, the *Commonwealth & Southern* case involved a reorganization of a holding company pursuant to Section 11(e) of the Act, in which one of the issues was the treatment to be accorded to perpetual warrants giving the holder thereof an option to purchase common stock of the company at $30 a share. The Commission approved a plan of

reorganization which, *inter alia,* excluded the warrant holders from participation. The District Court enforced the plan, stating with respect to the warrants that the Commission's "findings are sustained by adequate evidence." On appeal, a warrant holder, represented by counsel who is the respondent herein, challenged the Commission's findings, and the Court of Appeals for the Third Circuit affirmed.

In its decision, the Third Circuit expressly approved the valuation procedure which the Commission followed both in that case and the instant case. The court upheld the Commission's determination that compensation is to be accorded to warrant holders for terminating their option if, and only if, on the basis of reasonably foreseeable earnings, the common stock subject to the warrant might reach a value approximating the exercise price; but where all of the foreseeable factors make it improbable that the value of the common stock would approximate the exercise price, the value of the warrants, if any, is not susceptible of measurement on any rational basis and cannot be given any recognition in the Section 11(e) reorganization (pp. 7-11, *infra*). In the latter circumstance, as the Third Circuit noted, recognition of the warrants would require the Commission "to assume the role of soothsayer and venture a prediction as to a valuation for the options based upon some visionary conception of what the future could bring," and any finding of positive value would be "sheer conjecture

based on an arbitrary assumption which would be quite contrary to the rationale of the Otis and Engineers cases" (pp. 11, 12, *infra*). It is this over-all approach, which in his brief in opposition to certiorari (p. 3) respondent herein labels as "fantastic" and which, he states, the Second Circuit properly rejected.

In the *Commonwealth & Southern* case appellant, in arguing that the Commission erred in not finding a positive value for the warrants, relied on a chart relating to the annual mean prices of the common stock and of the warrants for the years 1931-1948. As to such evidence, which was also before the Commission in the *Niagara Hudson* case (R. 90, 137), and which the Second Circuit deemed so important (R. 123-124, 126), the Third Circuit stated that at best it would be "only some evidence of going business value . . . only remotely connected, if at all, with a determination of the going business value of an option warrant, which is the test laid down by the Otis and Engineers opinions" (p. 12, *infra*). As in the *Niagara Hudson* case, the Commission had before it evidence that "the possibility of future earnings of Commonwealth sufficient to establish value in the warrants was extremely remote" (p. 13, *infra*), and such evidence "is not eliminated or necessarily rendered less credible" because of past market prices for the warrants, which "represent, to a large extent, out and out market gambling," and "speculation as to what the Commission's course would be

in connection with the option warrants in question" (p. 13, *infra*).

The Third Circuit refers to the decision of the Second Circuit, noting "the similarities in the two cases" and the latter court's agreement that the Commission's findings must be affirmed if supported by substantial evidence and arrived at in accordance with the legal standards (pp. 13-14, *infra*), but an analysis of its opinion makes it clear that what the Third Circuit regarded as "abundant evidence" (p. 14, *infra*), the Second Circuit regarded as neither substantial nor insubstantial (R. 126); and that past market history, which the Second Circuit regarded as "positive evidence" of value (R. 124), the Third Circuit considered of little, if any, significance.[1]

It is clear, therefore, that there now exists a conflict of decisions in the circuits on the issue presented by the petition herein, which provides an additional reason for granting the writ.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

SEPTEMBER 1950.

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[1] It may be noted that the past market prices of the common stock and of the warrants were an integral part of the Commission's findings in the *Niagara Hudson* case (R. 90).

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,045

In the Matter of

THE COMMONWEALTH & SOUTHERN CORPORATION, ADELAIDE H. KNIGHT, APPELLANT

Appeal from an Order of the District Court of the United States for the District of Delaware

Argued January 17, 1950

Before Goodrich, McLaughlin and Hastie, Circuit Judges

OPINION OF THE COURT—Filed August 23, 1950

By McLAUGHLIN, *Circuit Judge.*

This is an appeal from the order of the District Court of July 15, 1949, approving and enforcing a plan, as amended, filed with the Securities and Exchange Commission by the Commonwealth & Southern Corporation, pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, 49 Stat. 820.

Appellant is the owner of Commonwealth option warrants. She first appeared in this matter at the hearing in the District Court. She did not participate in the proceeding before the Commission and offered no evidence in the District Court. The options receive nothing under the amended plan. The Court below found that while this was regrettable

"* * * the SEC's action has not been contrary to law and its findings are sustained by adequate evidence." In re Commonwealth & Southern Corporation, D.C. Del., 84 F. Supp. 809, 811.

A phase of this litigation was before us some time ago when appellant, after taking her appeal, applied for a stay of the enforcement of the plan, pending argument on the merits. The stay was denied and on October 1, 1949, the plan was effected, the corporation was dissolved and its assets distributed. Appellant and the intervenor are the only objectors to the plan.

Appellant urges that the options had substantial value for which compensation should have been provided in the plan.

Under a Commonwealth option warrant, its holder, after September 1, 1949, had the right to purchase a share of common stock "as its Common stock may be constituted at the time of purchase at a price of $30. per share." The Commission found that "the option warrants have no recognizable value and that the holders of such warrants are not entitled, under the standards of fairness and equity, to any participation in the reorganization of Commonwealth."

"The Commission's findings as to valuation, which are based upon judgment and prediction, as well as upon 'facts,' * * * are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards.'" S.E.C. vs. Central-Illinois Securities Corp., 338 U.S. 96, 126. This is the test to be applied to the case before us.[1]

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[1] See Professor Dodd's article, 63 Harv. Law Rev. 298.

The Commission's holding that the option warrants had "no recognizable value" is solidly supported by the record. The President of Commonwealth testified that the Commonwealth board of directors, even under the most optimistic view of possible paid up earnings by its subsidiaries, saw no prospect of the type of earnings which would make the common stock worth $30 a share and for that reason made no provision for the warrants.[2] Hartt, the Commonwealth expert, gave as his judgment that the warrants were not entitled to any compensation because it was almost inconceivable that Commonwealth would attain such earnings as would result in a price of $30 a share for the common stock, even though the stock were sold in the future at fifteen to twenty times earnings—in his opinion an unreasonable expectation. Appellant does not challenge the evidence before the Commission on which the latter based its conclusion, also not challenged, that "the reasonably foreseeable consolidated net income of Commonwealth may be estimated to average about $30,000,000 a year." Nor does appellant dispute the Commission's calculation that such an income, applied proportionately to the various interests in Commonwealth, if Commonwealth remained in existence, would be equivalent to about 63¢ per share of Commonwealth's common stock. That figure would require capitalization of earnings of about forty-eight times in order to make the exercise of the option advantageous to its owner. From 1931 to the date of the Commission decision the highest market price on the common had been 6⅛, so that the call could have

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[2] Cf. Ecker vs. Western Pacific R. Corp., 318 U.S. 448 at 476.

no value unless the stock rose to nearly five times that top figure. The market price of the common shares which obtained around the time of the said decision would have to increase from nine to ten times to give value to the call. There is no disagreement with the Commission's judgment that Commonwealth earnings included the savings from refunding operations and that there is no likelihood of any further real savings through refinancing. With this in mind, it is important to note that on the Commission's compilations, the Commonwealth subsidiaries as of the close of the Commission hearing were earning 6.6% upon their rate base. Capitalized at fifteen times earnings, certainly a liberal expectation, the rate of return would have to increase to 12.5% for the holding company stock to reach a value of $30 a share. Such increase would not be allowed in the strictly regulated public utility industry of which Commonwealth's subsidiaries are a part. The above resume of the testimony leaves no doubt but that the Commission's decision is well within the substantial evidence rule.

Assuming that the Commission had before it conflicting evidence as to value, that part of the evidence on which the Commission based its findings is not destroyed. And with the scope of our review limited, as it is, though we might disagree with the result reached, so long as that result is supported by substantial evidence we are without power to alter it. "As said in National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 597, 61 S. Ct. 358, 365, 85 L. Ed. 368: 'Congress entrusted the Board, not the courts, with the power to draw inferences from the facts. * * * The Board, like other expert agencies dealing with specialized fields * * *

has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony'. The rules quoted are applicable here." Pacific Gas & Electric Co. vs. S.E.C., 9 Cir., 127 F. 2d 378, 384, 139 F. 2d 208, affd. at 324 U.S. 826.

Appellant insists that the SEC refused to recognize what she calls the "trading value" or "premium value" of the warrants. This value is based, says appellant, on the perpetual call feature of the warrants, warrant holders having the right "to share in unanticipated earnings which, when they become foreseeable, push the market price of the stock beyond the level of the option price at which the warrants can be exercised."[3] We agree that

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[3] By her own reasoning, appellant demonstrates an inherent weakness in her position. In her argument on this branch of the case she says that "common stock in a continuing enterprise represents the residual chance to make a profit * * *. This opportunity encompasses two distinct elements: (1) anticipated earnings and (2) those earnings which cannot be foreseen but which may nevertheless eventuate." Appellant says "* * * that the warrants, * * *, reflect a portion of the second element of value, * * * that a going concern will realize now unforeseen earnings." Assuming arguendo all that appellant sets forth on this point, it seems clear that the warrant holders should not get what the common stockholders are denied, namely, some return on a going concern basis for profits which are not foreseeable. Under the practice followed by the Commission, the common stock receives a valuation based on foreseeable earnings in an 11(e) proceeding.

If there is no probability of earnings sufficient to boost the price of the stock to the level of the option exercise price, the warrant holder should not receive value based on a mere possibility, or less than that, of future earnings at the expense of the group of stockholders entitled to that value. If, at the time of the simplification proceeding, the once unanticipated profits, (sufficient to boost the price of the common stock to the exercise price) can, with some degree of probability, be seen in the reasonably foreseeable future, then, and only then, is the warrant holder entitled to receive a positive valuation for his option.

"* * * the Commission was required to give proper recognition to the value of the perpetual feature of the warrants." In re Electric Power & Light Corp., 2 Cir., 176 F. 2d 687, 691. But the SEC cannot, at the expense of the other security holders, place an affirmative valuation upon option warrants which have no chance, so far as the Commission can see, of being exercised at a figure favorable to the warrant holders within the reasonably foreseeable future.[4]

In connection with this phase of the appeal, future inflation stemming from possible results of the international situation and other possibilities are suggested as additional elements of value for the warrants. It is, therefore, contended that the warrants have a tangible worth and that the Commission failed to consider such elements in arriving at its determination. It is said, in effect, that the Commission erred in law by not speculating about any and all contingencies which, within the realm of possibility, might arise and, so arising, increase the common stock value of Commonwealth—increase it to almost five times the highest market price in the last eighteen years and nine to ten times its market price about the time of the Commission decision.

The Commission opinion makes it clear that all pertinent factors in our economy were considered

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[4] In addition, it is possible that the following holding of the Supreme Court might well be construed to be applicable here, and in fairness to all the security owners, would preclude the placement of a positive value on the warrants. In the Otis case the Supreme Court held that pre-existing contract provisions which produce results at variance with a legislative policy, which was not foreseeable when the contract was made, cannot be permitted to operate.

in reaching its decisions regarding the investment value of the various Commonwealth interests. Those conclusions are founded on the record and were arrived at, as we see it, " 'in accordance with legal standards' ". S.E.C. vs. Central-Illinois Securities Corporation, (supra, p. 126). The problem was one peculiarly for the Commission under the Engineers decision, S.E.C. vs. Central-Illinois Securities Corporation (supra). It has been resolved by what, we think, was the sound judgment of the Commission in refusing to assume the role of soothsayer and venture a prediction as to a valuation for the options based upon some visionary conception of what the future could bring. The Commission properly discharged its function when it made its best expert determination as to the yearly earnings within the reasonably foreseeable future, and, calculating therefrom and using the other pertinent evidence adduced, finally arrived at its conclusion.

The suggestion is made that by refusing compensation for the options, the Commission has given to one class of security holders what had been sold to another class. Otis & Co. vs. S.E.C., 323 U.S. 624, is cited for this but is validly distinguishable from the issue at bar. There, the Commission had determined that the common stock in question had a legitimate investment value, based on the forecast earnings, of a proportion of about 5½% of the corporate assets to the preferred's value of about 94½%. The valuations given the securities were grounded on foreseeable earnings with a reasonable probability of actual realization. Those valuations were upheld on appeal. In this matter, the Commission, on strong believable evidence, has found

that the options have no practical value. Any other finding on the particular facts would have been sheer conjecture based on an arbitrary assumption which would be quite contrary to the rationale of the Otis and Engineers cases.

The Commission rightly concedes that under certain facts an option warrant can have a recognizable value, as in the Electric Power & Light Corp. case—S.E.C. 1949, H.C.A. Release #8889, approved as In re Electric Power & Light Corp., supra, where "* * * there is the probability of the market price of Electric's common stock exceeding the exercise price of the warrant within the foreseeable future" but that is not the situation before us, where the Commission had no sound foundation from either the figures or testimony on which to make that kind of estimate.

It is said that the Commission should have been governed solely by what is asserted to have been their market value in determining the worth of the warrants. In support of this a chart is offered covering the years from 1931 to 1948. This shows that the annual mean prices of the common stock and of the options have a ratio of approximately eight to one. Appellant contends that the Commission must allow participation by the warrant holders in that proportion. We disagree. Were the proportionate table submitted by appellant a far more accurate gauge of market value than it is, it would still be only some evidence of going business value and in no wise controlling. Such evidence is only remotely connected, if at all, with a determination of the going business value of an option warrant, which is the test laid down by the Otis and Engineers opinions. The Commission had before it evi-

dence, which it was entitled to accept, that the possibility of future earnings of Commonwealth sufficient to establish value in the warrants was extremely remote. That evidence is not eliminated or necessarily rendered less credible, simply because there was testimony from which some value could be attributed to the stock. At any rate, we think the option prices during the years covered represent, to a large extent, out and out market gambling, plus (since the existence of the Commission and its consideration of this case) deliberate speculation as to what the Commission's course would be in connection with the option warrants in question.[5]

The same market value evidence regarding the warrants upon which appellant relies was, of course, before the Commission. The circumstance that it was not referred to in the Commission opinion is no indication that it was ignored. What appellant is really complaining about is the Commission's non-acceptance of it. It follows that there is no reason for remanding this matter to the Commission for the taking of additional evidence on market value of the warrants.

The Second Circuit decision in S.E.C. vs. Leventritt, 179 F. 2d 615, involving the reorganization of the Niagara Hudson Power Corporation, agrees that where the Commission's holding is supported by substantial evidence and was arrived at in accordance with legal standards, it must be affirmed. But in that opinion the Court found that the record

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[5] In 1942, in simplification proceedings, the Commission had directed that the warrants be eliminated from Commonwealth's corporate structure and this was upheld by us in Commonwealth & Southern Corporation vs. S.E.C., 134 F. 2d 747.

contained nothing to sustain the Commission decision that the Niagara options were valueless. We take the view, already expressed, that the record in the case before us contained abundant evidence to support the Commission's decision. In reaching this conclusion, we are not unaware of the similarities in the two cases.

On the evidence, the Commission properly held that the Commonwealth option warrants had "no recognizable value". Applying the "fair and equitable" test, it found that the warrants were not entitled to any participation in the reorganization of Commonwealth. In so deciding, we think that the Commission was within its statutory authority and that the District Court correctly approved its action.

The judgment of the District Court will be affirmed.

Judge Hastie concurs in the result.

A true Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Third Circuit.

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Nos. 211, 212

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SECURITIES AND EXCHANGE COMMISSION, *Petitioner*

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

INDEX

Page

Opinions below 1

Jurisdiction 2

Statute involved 2

Question presented 4

Statement 4

Summary of argument 9

Argument:

I. The undisputed facts show that on the basis of reasonably anticipated earnings the class B option warrants were without value 13

II. The Commission was not required to accord a participation to the warrants merely on the basis of their past market history, where its undisputed findings regarding prospective earnings, plus a liberal allowance for uncertainties, clearly indicated lack of value 31

Conclusion 44

Appendix 45

CITATIONS

CASES:

American & Foreign Power Co., Holding Company Act Release No. 7815, 9849 (1947), enforced and affirmed, 80 F. Supp. 514 20

American States Utilities Corp., Holding Company Act Release No. 6540 (1946), plan enforced without opinion, D. Neb., No. 96047 (1947) 20

Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 ..... 17, 20, 25

Central States Power & Light Corp., In re, 74 F. Supp. 360 24

Commonwealth & Southern Corp., In re, 84 F. Supp. 809, affirmed, 184 F. 2d 81 ..... 11, 23, 25-27, 32, 33, 36, 38

Community Gas & Power Co., Holding Company Act Release No. 6436 (1946) 19

Community Gas & Power Co., In re, 168 F. 2d 740, certiorari denied, 334 U. S. 846 17

Consolidated Rock Products Co. v. *DuBois*, 312 U. S. 510 .. 17

Ecker v. *Western Pacific R. Corp.*, 318 U. S. 448 ..... 8, 17

Electric Power and Light Corp., Holding Company Act Release No. 8889 (1949) 19, 36, 37, 38

Electric Power & Light Corp., In re, 176 F. 2d 687 ..... 17, 19, 22

Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523 ..... 17, 24

Page

Indiana Service Corp., Holding Company Act Release Nos. 7054, 7086 (1946), 66 P.U.R. (N.S.) 453, enforced without opinion (N.D. Ind.), appeal dismissed without opinion *sub nom. Propp* v. *SEC* 24
Interstate Power Co., Holding Company Act Release Nos. 7143, 7159 (1947), 70 P.U.R. (N.S.) 193, plan enforced, 71 F. Supp. 164 24
Jacksonville Gas Co., In re, 46 F. Supp. 852 ..... 17, 24
Lahti v. *New England Power Association*, 160 F. 2d 845 17
Long Island Lighting Co., 18 P.U.R. (N.S.) 65 41
Niagara Hudson Power Corporation, Holding Company Act Release No. 5155 (1944) 5
Niagara Hudson Power Corporation, Holding Company Act Release Nos. 6083, 6108 (1945), affirmed, *Phillips* v. *SEC*, 156 F. 2d 606 5
Orange & Rockland Electric Co., 49 P.U.R. (N.S.) 257 41
Otis & Co. v. *SEC*, 323 U. S. 624 ..... 11, 12, 17, 18, 22, 28, 30, 31, 43, 44
Schwabacher v. *United States*, 334 U. S. 182 21
Seattle Gas Co., Holding Company Act Release No. 7128 (1947), plan enforced without opinion (W.D. Wash.) 24
SEC v. *Central-Illinois Securities Corp.*, 338 U. S. 96 ..... 10, 12, 13, 15, 18, 20, 25, 42, 43
Spokane Gas & Fuel Co., Holding Company Act Release No. 6065 (1945), enforced without opinion (E.D. Wash.) 24
Standard Gas and Electric Co., In re, 59 F. Supp. 274, reversed, 151 F. 2d 326, certiorari denied, 327 U. S. 796 24
Staten Island Edison Corp., 60 P.U.R. (N.S.) 385 41
United Gas Corp., In re, 58 F. Supp. 501 20
United Light & Power Co., Holding Company Act Release No. 4215 29

STATUTES:

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. § 79 *et seq.*:
Section 1(b)(1) 24
Section 11(b)(2) 2, 5, 24
Section 11(e) 3, 5, 7, 18, 24, 25

MISCELLANEOUS:

Berle and Means, *The Modern Corporation and Private Property* (1937) 14
I Dewing, *The Financial Policy of Corporations* (1941) 14
Donaldson, *Business Organization and Procedure* (1938) 8
Garner and Forsythe, *Stock Purchase Warrants and "Rights"*, 4 So. Cal. L. Rev. 269 (1931) 8
Graham and Dodd, *Security Analysis* (1940) 14, 23
Guthmann and Douglass, *Corporate Financial Policy* (1948) 14
Hoagland, *Corporation Finance* (1947) 8, 14
New York Times, November 2, 1950 35

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BRIEF FOR SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 122-126, 128) is reported in 179 F. 2d 615. The opinion of the district court (R. 107-112) is reported in 86 F. Supp. 697. The findings and opinion of the Com-

mission, dated August 16, 1949, and its order dated August 25, 1949, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release Nos. 9270, 9295 (R. 48-95, 103-104).

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1950 (R. 128), and was amended by order of February 14, 1950 (R. 128-129). Petitions for rehearing were denied by the Court of Appeals on February 23, 1950, one judge dissenting (R. 151). Petitions for writs of certiorari were granted on October 9, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254, made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835 (15 U. S. C. § 79y).

STATUTE INVOLVED

Sections 11(b) and 11(e) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 822 (15 U. S. C. §§ 79k(b), 79k(e)), provides in pertinent part as follows:

> (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> * * * *
>
> (2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary

company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. . . .

* * * * * * * * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the com-

pany, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. . . .

QUESTION PRESENTED

Where warrants represent no interest other than an option to buy stock of a holding company at a price, found by the Commission on ample evidence to be substantially in excess of the present value of the stock, or of any future value that might rationally be forecast, does the "fair and equitable" standard of Section 11(e) of the Holding Company Act require, as a matter of law, that the holders of such warrants participate in the assets of the company in reorganization, merely because, in the absence of reorganization, such warrants might have continued to sell in the market at some value in excess of zero?

STATEMENT

This case involves one of two plans filed under Section 11(e) of the Public Utility Holding Company Act of 1935 by Niagara Hudson Power Corporation, a registered holding company. This plan contemplates dissolution of Niagara Hudson and the distribution of its assets among its stockholders after provision for the discharge of its indebtedness. One of the issues before the Commission and the district court, and the principal question dealt with by the Court of Appeals, was whether, under

the "fair and equitable" standard of Section 11(e), any participation should be accorded to the class B stock option warrants of Niagara Hudson. Aspects of the dissolution not concerned with the warrants are not now in controversy.

When the Section 11(e) proceedings were instituted, Niagara Hudson had outstanding the following securities: (1) notes payable to banks in the amount of $20,000,000; (2) first and second preferred stocks, $100 par value, in the amount of 378,875 and 105,930 shares respectively; (3) 9,580,988½ shares of common stock, $1 par value; (4) class B stock option warrants. These warrants represent options to purchase at any time 497,191-3/6 shares of common stock, each warrant entitling the holder thereof to subscribe to 1-1/6 shares of common stock upon payment of $50, or at the rate of $42.86 per share (R. 52).

Both plans were filed by Niagara Hudson under Section 11(e) for the purpose of complying with the provisions of Section 11(b)(2), 48 Stat. 821 (15 U. S. C. 79k(b)(2)), and the Commission's order thereunder (R. 54, 58-59).[1] One of the plans, since consummated and not challenged on appeal to the court below, provided for the consolidation into one operating company of Niagara Hudson's three principal operating subsidiaries, all of whose

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[1] *Niagara Hudson Power Corporation*, Holding Company Act Release No. 5155 (1944); *Niagara Hudson Power Corporation*, Holding Company Act Release Nos. 6083, 6108 (1945), affirmed, *Phillips* v. *SEC*, 156 F. 2d 606 (C. A. 2).

common stocks were owned by Niagara Hudson. This new operating company has issued all of its common stock to Niagara Hudson, while preferred stock was issued to the preferred stockholders of the constituent companies on a share for share basis and bearing the same dividend rates. The second plan, operative only upon consummation of the first, provided for the disposition by Niagara Hudson of its common stock interest in the new operating company by exchanging the same for its own preferred and common stocks, the transfer of Niagara Hudson's relatively small and miscellaneous assets to the new operating company, and the subsequent dissolution of Niagara Hudson.[2] The common stock of the new operating company is allocated to the common stockholders of Niagara Hudson on the basis of 0.78 shares of common stock for one share of Niagara Hudson common stock after payment of the bank loans (R. 54-56, 99-100).[3] No provision was included for participa-

[2] In order to effectuate the foregoing exchange, the common stock of the new operating company, issued to Niagara Hudson for its interest in the constituent companies, was reclassified pursuant to the plan into 1,939,220 shares of class A stock and 7,473,172 shares of common stock. The class A stock, having the same voting rights as the common stock but preferred as to dividends of $1.20 per share and other rights, has been used for the purpose of retiring Niagara Hudson's preferred stocks.

[3] Under the terms of the bank loan agreement, payment of dividends on the common stock of Niagara Hudson was prohibited so long as any part of the loans was outstanding.

tion by the holders of the class B stock option warrants (R. 54-56).

The Commission approved the plan by order dated August 25, 1949 (R. 103-104). On application of the Commission, and after hearing as prescribed in Section 11(e), the United States District Court for the Northern District of New York approved and enforced the plan by order dated November 4, 1949 (R. 1-104, 113-119). Respondent, as owner of 8,000 of the class B stock option warrants, appealed to the court below, complaining of the failure to make any provision for the warrant holders. The court below reversed the order of the district court and remanded the case on the ground that the Commission and the district court had erred in holding that it was "fair and equi-

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Hence, the plan provided that the common stockholders of Niagara Hudson, who wished to exchange their stock for the common stock of the new operating company prior to the retirement of the bank loans and to receive dividends thereon immediately, could do so by paying in cash their proportionate share of the bank loans. Otherwise Niagara Hudson was to retain the common stock of the new operating company and use the dividends thereon for the purpose of retiring these loans (R. 56, 101).

The balance of the bank loans was paid on November 1, 1950. The common stock of the new operating company will be distributed to the common stockholders of Niagara Hudson pursuant to the plan. The remaining assets of Niagara Hudson will be transferred to the new operating company, Niagara Mohawk Power Corporation, which will assume all remaining liabilities, including any obligation of Niagara Hudson with respect to the warrants, if such obligation should be established.

table" to deny the warrant holders a participation in the assets of Niagara Hudson.

The court below affirmed the holdings of the Commission and of the district court that the interests of the warrant holders need not be perpetuated through new option warrants, stating that "in the discharge of [its] duty the Commission was free to eliminate such securities as these, constituting as they did a perpetual right to demand an increase in the common shares of the new company," and that the possibility of such "increase in the capital of a public utility company might well be deemed, certainly a needless, and perhaps a disturbing, 'complexity' in its 'structure' " (R. 123). *Cf. Ecker* v. *Western Pac. R. Co.*, 318 U. S. 448, 475-476.[4] As the court indicated, "the only issue is whether it was permissible to appraise the 'warrants' as worthless" (R. 123). On that issue, the court below accepted the Commission's earnings forecast, and agreed that such forecast indicated a value for the common stock of Niagara Hudson equal to about one-third of the exercise price of the warrants. But for reasons discussed below, it concluded that the present record did not contain "any evidence 'substantial' or insubstantial to support the finding that these 'warrants' were wholly worthless" (R. 126); and that the market history,

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[4] See also Hoagland, *Corporation Finance* (1947) 289-290; Donaldson, *Business Organization and Procedure* (1938) 271; Garner and Forsythe, *Stock Purchase Warrants and "Rights"*, 4 So. Cal. L. Rev. 269, 272 (1931).

including the fact that the warrants sold at more than nominal prices on past occasions when the stock of Niagara Hudson was quoted at about its current value, showed that the warrants had, as of the date of the plan, some positive value (R. 122-125). Judge Clark concurred in the result. He indicated that while there was persuasive evidence in the record to support the Commission's findings, he was disposed in favor of a remand so that the Commission might consider "the market quotations, now deemed so important" (R. 126-127).

On February 15, 1950, the Commission filed a petition for rehearing, in which petition Niagara Hudson joined. In this petition the Commission, *inter alia,* urged that, in the face of the undisputed earnings forecast, market quotations could not be regarded as a proper guide for determining the investment value of the warrants and, further, that in disallowing any participation for the warrants the Commission was fully aware, as the record shows, of the market history of the warrants. (R. 130-150). On February 23, 1950, the court below denied the petitions for rehearing. Judge Clark, who had previously concurred, dissented and voted to grant rehearing (R. 151).

SUMMARY OF ARGUMENT

It is now settled law that the Commission's duty in passing upon the fairness of a plan is to accord each security holder no more nor less than the "investment or going-concern value of his security."

SEC v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 139. To the Commission this means that determinations of value must rest upon rational analysis, rather than conjecture, as to the possibilities of each class of securities participating in the assets and earnings of the enterprise.

Under his contract the warrant holder could acquire the rights of a stockholder and become entitled as such to share in assets or earnings only by paying the exercise price. Accordingly, the Commission valued the warrants by appraising the possibility of the stock becoming worth the exercise price. The Commission's best judgment as to future earnings indicated a value for the stock equal to about one-third the exercise price of the warrants. It was unable to foresee any substantial prospect that the earnings would rise to a point which would make the warrants worth exercising and on this basis it was forced to conclude that the warrants had no intrinsic or investment value. The opinion below appears to agree that there is ample evidence to support the Commission's forecast of foreseeable earnings, and does not intimate that the Commission was compelled to find that there was a substantial prospect of the warrants ever being worth exercising. Under the principles which have heretofore been applied in Holding Company Act reorganizations the Commission was therefore clearly justified in concluding that no "investment or going-concern" value could be at-

tributed to the warrants, and in denying them any participation. The Court of Appeals for the Third Circuit, upon a similar record, upheld the Commission's denial of participation to the holders of Commonwealth & Southern warrants, in square conflict with the decision below. See *In re Commonwealth & Southern Corp.*, 184 F. 2d 81.

The opinion below apparently rejects as irrelevant criteria derived from an appraisal of the intrinsic, or potential exercise, value of the warrants. The court reasoned, first that the warrants have a value as a result of the willingness of purchasers to pay for the chance that current judgment as to the future of the property may be too unfavorable even though this "may be no more than a gamble," and second, that the warrants represent types of interest which under *Otis & Co.* v. *SEC*, 323 U. S. 624, must be compensated. Its decision either requires the Commission to compensate the warrant holders for loss of a potential market value as such or requires the Commission to substitute for its own judgment, derived from analysis of foreseeable earnings, some "average" or other statistical expression of the valuation put upon the warrants by those who traded in them. On either interpretation it represents an unsound departure from the principles which this Court has heretofore upheld. The decision below rests, we believe, upon a misreading of the *Otis* case, in-

terpreted as requiring compensation to a common stock for some remote possibility of value "although the estimate of 'foreseeable' earnings did not justify a conclusion that they would ever leave a margin over the preferred dividends." Actually, the action of the Commission, which the *Otis* case upheld, rested upon a forecast of foreseeable earnings high enough to discharge arrears in preferred dividends in a period of 15 years, whereupon the common stock would be entitled to a liberal share in earnings. The basic controversy was whether the preferred stock was to be valued as a matured claim, or, as was decided, upon a going concern basis.

Since the *Otis* case, as interpreted in the *Central-Illinois* case, is an application of the rule of strict priority, incompatible with the recognition of "amorphous" principles of "colloquial equity," it requires that participations in reorganization rest upon something less elusive than the loss of a remote possibility of participating in the enterprise, or the termination of an opportunity to make a profit by trading in otherwise worthless pieces of paper.

II.

The evidence of market history upon which the court below relied, was relatively weak evidence of intrinsic value. The Commission was fully war-

ranted in rejecting this evidence in view of the mass of evidence in the record from which it derived its forecast of future earnings and its inference that there was no reasonable-prospect of the warrants ever being worth exercising. Even liberal allowances for uncertainties of the future, in recognition of the perpetual call feature of the warrants, did not, in the Commission's view, permit an affirmative finding that the warrants had a value in excess of zero. The fact that the Niagara Hudson stock represented an interest in a regulated industry emphasizes the remoteness of any possibility of future earnings exceeding the Commission's forecast by a margin sufficiently wide to make the warrants worth exercising.

Under the Act, the Commission had the duty of determining the weight to be given the valuation evidence. See *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 126. Thus, if the decision below rests upon a ruling that the market history of the warrants was persuasive, rather than exclusive, evidence of their value, it is nonetheless erroneous.

ARGUMENT

I.

The Undisputed Facts Show That on the Basis of Reasonably Anticipated Earnings the Class B Option Warrants Were Without Value.

1. The Niagara Hudson warrants, representing an option without limit of time to purchase its common stock, are a type of securtiy which developed

during the speculative era of the late twenties. Among the more important issuers of these warrants were public utility holding companies and investment trusts. To the conservative investor, who frequently obtained these warrants in connection with the purchase of bonds or preferred stocks, the warrant offered a possibility of additional gain with little or no risk to himself, while, to those with an eye upon the market rather than long term investments, the warrant provided superb opportunities for speculation in the warrants themselves.[5] Such perpetual warrants have seldom, if ever, been exercised, and trading in the warrants has been carried on largely in expectation of profit based on anticipated market trends in the price for the warrants.[6]

Since the warrants in terms provide that the holder thereof should have "no rights as a stockholder" unless he exercised his option, the Commission treated them as entitled to participate only to the extent that they represented a potential interest measured by their exercise price in relation to the potential value of the stock. Under the Act

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[5] I Dewing, *The Financial Policy of Corporations* (1941) 253-254, 255-256, 258-259; Hoagland, *op. cit. supra*, 277, 280-281; Graham and Dodd, *Security Analysis* (1940), 640-641.

[6] See I Dewing, *op. cit. supra*, 254; note u; Guthmann and Dougall, *Corporate Financial Policy* (1948), 344-345.

Because of their speculative character, some doubt has been cast upon the legality of option warrants in general. Berle and Means, *The Modern Corporation and Private Property* (1937), 180-185.

the Commission has the "duty in passing upon the fairness and equity of the plan to accord each security holder, in the order of his priority, the investment or going-concern value of his security." See *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 139. This necessarily involved an analysis of prospective earning power applicable to the outstanding securities of Niagara Hudson, both to ascertain whether each class of securities represented any real "going-concern value," and, with respect to those classes of securities found to have a value, to determine whether the securities allocated to them were the equitable equivalent of the interest surrendered. Thus appraisal of future earning power was crucial not only with respect to the treatment of the warrants but with respect to other major issues dealt with in the Commission's opinion.

The Commission's Findings and Opinion contain a comprehensive analysis of both past and prospective earnings of the Niagara Hudson system (R. 62-71, 81-82). Respondent neither participated in developing the administrative record nor brought that record to the court below but limited himself to arguments based upon the facts set forth in the Commission's findings. The Commission's subsidiary findings of fact thus are not, and cannot be, in dispute. The court below did not question the adequacy of the valuation data in the record to support the Commission's forecast of future earnings.

The Commission found, and the court below accepted this finding (R. 124), that were Niagara Hudson to continue as a going enterprise, the system's consolidated net income reasonably might be expected to average about $15,750,000 per year. After deducting dividend requirements of $2,424,000 on Niagara Hudson's preferred stock, this would leave a net income of $13,326,000 applicable to the common stock of Niagara Hudson, or $1.39 per share on the 9,580,988 shares of Niagara Hudson's common stock. On a liberal estimate of a value for the common stock of Niagara Hudson at 15 times consolidated earnings, it would require earnings of $2.86 per share to make the value of this stock approximate the exercise price of $42.86 per share, payment of which the warrant holder was required to make before he would become a stockholder entitled, as such, to participate in the earnings or the assets of the enterprise. The Commission concluded that any possibility of such increment in foreseeable earnings was too remote and speculative and that it could not "find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future." Accordingly, it concluded the warrants had no measurable and recognizable investment value (R. 82). The warrant holders, therefore, were allowed no participation in the reorganization (R. 82). The district court upheld

the Commission's findings (R. 112, 116; 86 F. Supp. 697, 701).

2. The action of the Commission and of the district court involved nothing more than an application of the rule of strict priority which this Court has repeatedly held to be basic to the term "fair and equitable" as words of art in the historical development of federal reorganization law.[7] In applying that standard this Court has repeatedly emphasized that there must be equivalence between what is given and what is surrendered, and that reasonably prospective earnings constitute the primary criterion of value to be employed in reorganization.[8] This criterion, developed in bankruptcy reorganization is applicable likewise in Section 11(e) reorganizations in determining the present investment value of any class of securities with respect to which the right to participate in the proposed reorganization is asserted.[9] If on

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[7] *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115.

[8] *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 525-526; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 540-542; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 483.

[9] *Otis & Co.* v. *SEC*, 323 U. S. 624, 631-632; *In re Electric Power & Light Corp.*, 176 F. 2d 687 (C. A. 2); *Lahti* v. *New England Power Association*, 160 F. 2d 845 (C. A. 1); *In re Community Gas & Power Co.*, 168 F. 2d 740 (C. A. 3), certiorari denied, 334 U. S. 846; *In re Jacksonville Gas Co.*, 46 F. Supp. 852 (S. D. Fla.).

the basis of reasonably foreseeable earnings there appears to be no value for a class of securities, such securities cannot be accorded any participation in the reorganized company. These are the elementary requirements of the "fair and equitable" standard and the rule of strict priority applicable alike in bankruptcy reorganization and in reorganization under Section 11(e).[10] It is immaterial whether the interest asserted represents debt, preferred or common stock, or option warrants.

Reorganization or liquidation of solvent holding companies pursuant to the requirements of Section 11(b) of the Holding Company Act, does present one variation from the typical Bankruptcy Act reorganization in that otherwise inchoate rights such as the liquidation preferences of preferred stockholders are "evaluated on the basis of a going business and not as though a liquidation were taking place." *Otis & Co.* v. *SEC*, 323 U. S. 624, 633. See also *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 130. We agree with the respondent and the court below that similar principles apply in determining the rights of the Niagara Hudson warrant holders to participate in the instant dissolution. Accordingly, although a warrant represents nothing more than an unexercised option with no present interest in earnings, the Commission would have accorded the warrant hold-

[10] See *Otis & Co.* v. *SEC*, 323 U. S. 624; *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 130.

ers a share in the assets at the expense of the common stockholders, if it had found that the liquidation of the company resulted in the transfer of some measurable value from the warrant holders to the stockholders. In fact, the Commission has approved such participation where there was a reasonable expectation of the value of the security exceeding the exercise price of the warrants in the foreseeable future.[11] However, after full consideration of the elaborate valuation data before it, the Commission concluded that there was no reasonable prospect or "expectancy" of the Niagara Hudson common stock ever reaching a value which would make it advantageous for the warrant holders to exercise their option (R. 82). Indeed all the foreseeable factors, including the fact that Niagara Hudson's income was derived from a regulated industry, pointed to the improbability of such extreme appreciation in value. The court below assumed a value for the Niagara Hudson stock of approximately one-third the exercise price of the warrants (R. 124). It did not intimate that the record would support, much less require, a finding that there was any substantial prospect of the stock reaching a value which would make the option worth exercising. Under these circumstances, we believe that the value of the warrants, if any, is

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[11] *Electric Power and Light Corp.*, Holding Company Act Release No. 8889 (1949), pp. 70-74, affirmed, 176 F. 2d 687, 691 (C. A. 2); *Community Gas and Power Co.*, Holding Company Act Release No. 6436 (1946), pp. 29-30.

not susceptible of measurment on any rational basis and cannot support any participation for the warrants.[12]

To compensate the warrant holders at the expense of the stockholders because of nothing more than the impossibility of proving that a rational forecast is infallible, or because unanticipated contingencies may propel earnings to a level not now envisaged, is just as much an invasion of the rule of strict priority as to countenance participation because a security has a nuisance value, *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115-119; or to recognize the type of "colloquial equity" which this Court has unqualifiedly rejected. See *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 152, where this Court stated, "Congress, perhaps believing that the application of such an amorphous standard as that of 'colloquial equity' was beyond the competence of courts and commissions, has instead prescribed the re-

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[12] See, for example, *In re United Gas Corp.*, 58 F. Supp. 501, 519 (D. Del.); In *American & Foreign Power Co.*, Holding Company Act Release No. 7815, 7849 (1947), enforced and affirmed, 80 F. Supp. 514 (D. Me.), warrant holders were denied participation. This plan was subsequently withdrawn because changed circumstances had made the plan unfeasible. In *American States Utilities Corp.*, Holding Company Act Release No. 6540, p. 11 (1946) plan enforced without opinion, D. Neb., No. 96047 (1947), warrant holders, having right to purchase common stock at $20 per share, were denied participation where future earnings applicable to common stock were 53 cents per share.

quirement that investment values be preserved." To the extent that economic developments have indicated that the warrant holders' claim upon the future of the enterprise is a mere will-o'-the-wisp, they cannot equitably exact compensation from the common stockholders for the termination of such claim. As this Court stated in *Schwabacher* v. *United States*, 334 U. S. 182, 199, in connection with the charter rights of security holders of a company subject to Federal reorganization, "Such charters and laws usually have been drawn on assumptions that time and experience have unsettled. Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces."

3. The decision below cannot be sustained on the peculiar characteristics of option warrants as distinguished from conventional securities. If compensation were required in this case, it would also have to be accorded to apparently worthless stocks, which continue to have a market value as long as they remain outstanding because of their perpetual right to share in future earnings which no one can reasonably foresee.

Under the terms of his contract, the warrant holder has no right or interest in the present assets and earnings of the company; all that he has is a bare right to insist upon delivery of common

stock of Niagara Hudson upon tender of the subscription price, so long as the company remains in existence. The company is not required to maintain its corporate existence for the benefit of the warrant holder; and, if at the time of dissolution the warrant has not been exercised, and is not worth exercising because the value of what he will receive is less than the subscription price, the warrant holder has no cause to complain if his warrant is terminated as an incident to the dissolution.[13] However, as noted above, the Commission has interpreted the *Otis* decision as requiring that the warrant holder's interest be measured on a going concern basis, and not as if in liquidation, thereby going beyond the letter of the contract to treat a mere unexercised option as if it were a present interest in the enterprise. Valuing the *Electric* warrants on that basis, the Commission noted in that case, that "their value lies essentially in the circumstance that they represent a perpetual call upon a portion of the increment in value of the enterprise." *Electric Power and Light Corp.*, Holding Company Act

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[13] Under the terms of his contract, the warrant holder "is entitled to purchase at any time (without limit)" common stock of Niagara Hudson at the rate of $42.86 per share, and "to receive a certificate for the shares of Common Stock so purchased upon presentation and surrender of this Class B Option Warrant duly endorsed and upon payment of the purchase price * * *. This Class B Option Warrant does not entitle the holder hereof to any rights whatsoever as a stockholder of the Corporation." (R. 143, 145).

Release No. 8889, p. 73 (1949).[14] By the same token, participation by the warrant holders necessarily requires a determination whether this possible enchancement in the value of the enterprise, upon which their claim is based, represents something of measurable value, or whether, as the Third Circuit indicated, it is premised on "sheer conjecture" so that it cannot be ascertained with any rational degree of certainty. See *In re Commonwealth & Southern Corp.*, 184 F. 2d 81, 85, discussed pp. 25-26, *infra*. Thus, from the very definition of the warrant holder's interest in the enterprise, it follows that, as in the case of common stock itself, the determination of its value must be made in terms of projected earnings. And, where, on the basis of the evidence it is apparent that such earnings are not likely to reach the potential level at which the warrant holder's interest may be said to commence—in this case when earnings exceed or reach a capitalized value of $42.86 per share—no windfall results to the common stockholders from denying recognition to the warrants.

Except for contrary implications in the decision below, it is settled law that even common stock, whose anticipations are as perpetual as those of option warrants, may not participate in reorganization unless there is some affirmative basis for attributing value to it on a rational hypothesis as

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[14] See also Graham and Dodd, *Security Analysis* (1940) 640, 645.

to future earnings.[15] Warrant holders cannot be expected to be treated with greater solicitude simply because the speculative possibilities of the perpetual warrant are more readily recognized and may have prompted their creation. On the contrary, the extensive reorganizations required by Section 11(b) (2) of the Act reflect, *inter alia*, the legislative findings in Section 1 (b) (1) of the Act, 49 Stat. 803 (15 U. S. C. § 79a(b) (1)), that holding-company securities have been "issued upon the basis of fictitious or unsound asset values hav-

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[15] This has been the uniform tenor of decisions under the Holding Company Act as well as the rule in bankruptcy reorganization. *In re Standard Gas and Electric Co.*, 59 F. Supp. 274, 283, (D. Del.), reversed on other grounds, 151 F. 2d 326 (C. A. 3), certiorari denied, 327 U. S. 796 (common stock); *In re Central States Power and Light Corp.*, 74 F. Supp. 360, 361 (D. Del.); (preferred and common stocks); *In re Jacksonville Gas Co.*, 46 F. Supp. 852, 857 (S. D. Fla.) (common stock). *Cf. Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 536-542.

Other cases under Section 11(e) of the Act in which common stockholders have been denied participation because they had no measurable investment value in terms of the reasonably prospective earnings are: *Indiana Service Corp.*, Holding Company Act Release Nos. 7054, 7086 (1946), 66 P. U. R. (N. S.), 453, enforced without opinion (N. D. Ind.), appeal dismissed without opinion *sub nom. Propp* v. *SEC* (C. A. 7); *Interstate Power Co.*, Holding Company Act Release Nos. 7143, 7159 (1947), 70 P. U. R. (N. S.) 193, plan enforced, 71 F. Supp. 164 (D. Del.); *Spokane Gas & Fuel Co.*, Holding Company Act Release No. 6065 (1945), enforced without opinion (E. D. Wash.); *Seattle Gas Co.*, Holding Company Act Release No. 7128 (1947), plan enforced without opinion (W. D. Wash.).

ing no fair relation to the sums invested in or the earning capacity of the properties . . . in anticipation of excessive revenues from subsidiary public-utility companies." Hence, where the claim of any security, including warrants, to participate in a reorganization, is unrelated to the "earning capacity of the properties" and is derived from speculative possibilities of "excessive revenues" not justified by reasonably anticipated earnings, the "fair and equitable" requirements of Section 11(e) preclude recognition of these spurious rights or interests. Such putative values "reflect merely vague hopes or possibilities", and junior interests cannot be permitted "to perpetuate their position in an enterprise on such ephemeral grounds." *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 123. Precisely the same considerations apply where the warrant holder is claiming the equivalent in cash of the warrant he is required to surrender. See *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 143.

The Commission's approach to the question presented herein was recently affirmed by the Third Circuit in *In re Commonwealth & Southern Corporation*, 184 F. 2d 81. The *Commonwealth & Southern* case, like the instant case, involved a reorganization of a holding company pursuant to Section 11(e) of the Act, in which one of the issues was the treatment to be accorded to warrants giving the holder thereof an option without limit of time to purchase common stock of the company at

$30 a share. The plan excluded the warrant holders from participation, and the Commission found that this was "fair and equitable" on the ground that, on the basis of anticipated earnings, it appeared highly improbable that the value of the common stock would approximate the exercise price. The district court enforced the plan, stating with respect to the warrants, that the Commission's "findings are sustained by adequate evidence." *In re Commonwealth & Southern Corp.*, 84 F. Supp. 809, 811 (D. Del.). On appeal, a warrant holder, represented by counsel who is the respondent herein, challenged the Commission's findings and the Third Circuit affirmed. The court held that the Commission's findings that the option warrants had no recognizable value was "solidly supported by the record." The court agreed with the Commission that reasonably prospective earnings constitute the appropriate criterion for determining the value of a security for which participation in the reorganization is claimed and that such earnings did not justify a finding of positive value for the warrants. In such circumstances, as the court noted, recognition of the warrants would require the Commission "to assume the role of soothsayer and venture a prediction as to a valuation for the options based upon some visionary conception of what the future could bring," and any finding of positive value would be "sheer conjecture based on an arbitrary

assumption which would be quite contrary to the rationale of the Otis and Engineers cases," 184 F. 2d at 84, 85.

4. Rejection of this approach by the court below marks, we believe, a radical departure from the fair and equitable standard. In holding that the elaborate valuation data in the record relating to the value of the stock constituted no evidence at all that the warrants were without value, the majority opinion thereby ignores what Judge Clark characterizes as "the strong case the Commission builds to show that, except for a gambler's chance in the market, the warrants will never produce results . . ." (R. 126). Instead it requires that the warrant holders should be compensated for the loss of an opportunity to continue trading in the warrants and the consequent possibility of selling them for something in excess of zero. We are unable to perceive, however, what considerations of fairness and equity could require that the warrant holder be compensated at the expense of the stockholders for the mere loss of a chance to sell the warrant to some third party for an amount in excess of its intrinsic value.

To the court below value for the warrants results from "a willingness to pay cash for the chance that the market's judgment as to the future of the property may be too unfavorable;" and, although recognizing that such willingness to buy warrants "may, or may not, be the result of a rational fore-

cast" and that it "may be no more than a gamble," the court below concluded that the Congress did not intend to deny them recognition in Holding Company Act reorganizations. In requiring that the Niagara Hudson warrants be accorded such recognition, at the expense of its common stockholders, the court below states that the *Otis* case, 323 U. S. 624,

> . . . appears to us to have recognized property whose value was quite as speculative as this. In that case the common shares of a company in reorganization had no "equity" over the preferred shares at the existing values of the assets, yet the Commission allowed them something out of the pockets of the preferred; and the court affirmed its ruling. That necessarily involved holding that, although the estimate of "foreseeable" earnings did not justify a conclusion that they would ever leave a margin over the preferred dividends, the chance that there might be a margin was not to be denied the common stock which had contributed to the original venture. [R. 125]

We believe this interpretation of the *Otis* case to be erroneous. In that case, this Court sustained the action of the Commission in granting a participation of approximately 5% in the assets of a holding company to common stockholders who had no

present right to earnings because of large preferred dividend arrearages. Such participation was upheld because, upon the Commission's estimate of earnings, it appeared that, in the absence of reorganization, arrearages on preferred stock would be paid off within the foreseeable future and that the common stock would then acquire a right to a share in the earnings of the enterprise. The earnings forecast made by the Commission, while liberal, coincided with the average system earnings for the prior six years, after controversial adjustments for certain items regarded as non-recurrent, and the earnings for the last 12-month period then available, without any such adjustment, actually exceeded the Commission's forecast. See *United Light & Power Co.*, Holding Company Act Release No. 4215, at p. 17. Thus, the forecast, although disputable, was not a wholly arbitrary one. The major controversy upon which both this Court and the Commission divided was whether the preferred stockholders' liquidation preference, including arrears, should be valued on the basis of its going concern value rather than as a matured claim. Once this issue was resolved against maturing the claim of the preferred, it was evident from the earnings forecast that the common stockholders had a real interest in the going concern, although of course there was a risk factor which the Commission took into account in determining whether

approximately 5% of the company's assets was the equitable equivalent of the interest surrendered.[16]

Here, however, the Commission has concluded, as a matter of fact, that the Niagara Hudson warrant holders did not have any measurable interest in the going concern, and, unlike the situation in the *Otis* case, the range of anticipated earnings was far below the level of the potential equity at which the warrant holders claim would assume a legitimate interest in the earnings and assets of the company. As we have indicated, while the legislative history reviewed in the *Otis* case indicates an intention on the part of the Congress that in the administration of Section 11 the Commission should recognize all legitimate investment values, there was no intention of requiring recognition of wholly irrational or conjectural values, which appear beyond the range of probabilities and are based upon nothing more than the speculators' ap-

[16] In the absence of reorganization the common stockholders in that case were entitled to have all earnings applied to build-up their residual equity in the company, either by application to the discharge of the arrears on preferred dividends, which were a non-interest-bearing claim, or through investment in earning assets. By contrast, the Niagara Hudson warrant holders have no contract right to benefit from the company's earnings prior to the exercise of their warrants. While the contract protects them against dilution in value through stock split-ups, it expressly provides, *inter alia*, that the company would be free to pay stock dividends (to the extent of available surplus, we assume) without the necessity for any adjustment in the warrant exercise price (R. 144).

praisal of remote contingencies. *See Otis & Co.* v. *SEC*, 323 U. S. 624, 636.

The vigorous dissent in the *Otis* case by one of the Commissioners and by three Justices of this Court appears to reflect an apprehension that the valuation technique there employed might lend itself to an arbitrary disregard of the rights of senior security holders for the benefit of junior interests. Thus, the Commission's valuation was characterized by the dissenting Justices as "peering into the future with almost clairvoyant percipience," 323 U. S. 624, 642. While we do not agree that this is a valid criticism of the Commission's application of the fair and equitable standard, general acceptance of the interpretation of the *Otis* case put on it by the court below would go far to vindicate that expression of dissent.

II.

The Commission Was Not Required to Accord a Participation to the Warrants Merely on the Basis of Their Past Market History, Where Its Undisputed Findings Regarding Prospective Earnings, Plus a Liberal Allowance for Uncertainties, Clearly Indicated Lack of Value.

In the court below, respondent derived a double-barreled argument from the market history of the warrants. He contended, first, that this market history was compelling evidence of value which outweighed the inferences drawn by the Commission from its own analysis of future earning power applicable to Niagara Hudson's common

stock; and second, that since warrants are commonly purchased as a "hedge" against the uncertainties of the future, and thus without reference to any estimate of the probable future value of the security subject to option, they are entitled to compensation for loss of market value as such. We believe the opinion below rests primarily upon an acceptance of the latter argument, already dealt with in Point I of our brief.

1. The Commission was not compelled to accept the market history of the warrants as conclusive evidence of their intrinsic value. As the Court of Appeals for the Third Circuit held with reference to the similar market history in the *Commonwealth & Southern* case, even if it constituted some evidence of value, this evidence had not "eliminated or necessarily rendered less credible" the evidence before the Commission "which it was entitled to accept, that the possibility of future earnings of Commonwealth sufficient to establish value in the warrants was extremely remote" (184 F. 2d 81, 85).

In our view, the market history of the warrants constitutes relatively remote and, certainly inconclusive, evidence of their intrinsic value. This market history is summarized in Appendix F to the Commission's opinion (R. 90). The past market prices, as the Third Circuit observed, to a large extent represented "out and out market gambling," while the more recent price quotations reflected "deliberate speculation as to what the Com-

mission's course would be in connection with the option warrants in question" (184 F. 2d 81, 85). The range of quotations summarized in that table could represent at most the opinions of the divers parties to transactions in the warrants, opinions which showed the widest variation over the years and between each year.[17] We have appended a chart showing the variations in quotations for the warrants expressed as a percentage of quotations for the stocks at the end of each quarter during the years selected by respondent. See Appendix.

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[17] Respondent below argued, on the basis of a deceptively simple chart, that there was a relationship between "the annual mean prices" (the mid point between the high and the low for the years 1932 to 1947) for the Niagara Hudson common stock and warrants which indicated a permanent value for 5½ warrants equal to one share of common stock. On the basis of these figures respondent argued before the Commission that the warrants had a value of $2.00 apiece, and before the Court of Appeals (the market having gone up after the Commission's approval of the plan) for a value of $3.00 a warrant. Respondent's own cost in the course of the proceedings was $1500 for 8,000 warrants, for which he would receive $16,000 at $2.00 apiece or $24,000 at $3.00 apiece or from over 10 to over 15 times his own cost. While the approach of the court below was less mechanical, it apparently was impressed by the fact that "in the six high years, 1933-1939, when the average of the high for the shares was nearly thirteen, and the average of the high for the 'warrants' was two and a half, the proportion was about one to five." (R. 123) We believe that inferences drawn from "averaging" the highest of particular years from median prices gives a wholly illusory picture concerning the degree of persistence in market appraisals of the relationship between warrants and the stock.

We question whether those whose purchases are reflected by the market history of the warrants had an opportunity to make a serious study of the company's future at all comparable to that made by the Commission and by the witnesses who testified in the proceeding. More significantly, we believe that the market history of the warrants, relied upon by respondent and the court below, does not even substantially reflect the opinion of those who dealt in the warrants as to the possibility of the warrants ever becoming worth exercising.[18] If we start, as the court below did start, with the unchallenged finding of the Commission that there is no basis for a rational forecast that the Niagara Hudson common stock would ever reach a value equal to the exercise price, then no purchaser of the warrants, however well-informed as to the possibilities of the company, could be in a position to make more than the blindest guess as to the intrinsic value of the warrants. In that respect transactions in the warrants could represent nothing more

[18] The court below was forced to disregard recent quotations indicating only a nominal value for the warrants (between 1/4 and 1/8 during the first half of 1949). Presumably this was because the court assumed that the recent market reflected an anticipation that the warrants would soon be extinguished and that the warrant holders would probably receive nothing in the plan. We agree that this was a good reason for disregarding the recent market for the warrants, but believe, for reasons stated in the text, that the Commission had equally good reasons for rejecting the market appraisal in earlier years.

than a type of market behavior which reflects the ebb and flow of speculative sentiment in regard to securities which are worthless by any rational criterion.[19] This is the significance, we believe, of the fact which impressed the court below "that at no time did the 'warrants' become worthless, not even when the shares had gone down to their low of seven-eighths" (R. 123-124).

The fact, confirmed by the market history of the Niagara Hudson warrants, that such warrants continue to be traded, no matter how remote the prospect of their acquiring an exercise value, and the further fact that in rising markets quotations for the warrants tend to rise much more rapidly than for the stock, indicate merely that so long as such warrants continue outstanding they afford a convenient mechanism of speculative trading.[20] This fact itself supplies a motivation for the purchase and sale of the warrants wholly unrelated to any possible expectation of exercising the warrants on the part of those who trade in them.

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[19] Recent trading in Russian Imperial bonds which during this year have been fluctuating between $17.50 and $36.25 per thousand dollars provides an illustration of such trading. *New York Times*, November 2, 1950, p. 54.

[20] As the opinion below notes (R. 125), when the market price for the common stock rises the market price for the warrants also rises but at a proportionately higher rate, and those who are actually astute enough or lucky enough to anticipate the ups and downs of the market can obtain greater profits with a given outlay of capital invested in the warrants than from speculating in the stock. See also note 5, *supra*.

2. Respondent argued below that in the *Electric Power and Light* case the Commission itself rested its valuation of option warrants upon a study of past market relationships between the warrants and the common stock on which the warrant holders had an option. The *Electric* case involved a perpetual warrant entitling the holder thereof to purchase common stock of the company at $25 per share. The Commission approved a plan allocating new common stock to the warrant holders at the ratio of one share of stock for three warrants, where, on the basis of future earnings, the value of the common stock "would be between $25 and $30 per share." See Holding Company Act Release No. 8889, pp. 73-74. Thus, the significant difference between the *Electric* case and the instant case is that in the *Electric* case the Commission found from its analysis of earning power that there was "probability of the market price of Electric's common stock exceeding the exercise price of the warrant within the foreseeable future."[21] In the instant case, as we have seen, the Commission was unable to forecast, from its analysis of earning power, a reasonable possibility of the Niagara Hudson warrants reaching the point of parity with the exercise price where it started in the *Electric* case.

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[21] On that ground the Commission specifically distinguished its holding in the *Commonwealth & Southern* case, since affirmed by the Third Circuit. See Holding Company Act Release No. 8889, p. 74, n. 78.

Even in the *Electric* case, moreover, the Commission did not rest its approval of an allocation to the warrant holders upon any historical market relationship between the prices for the stock and the warrants but expressly stated that this was a matter of judgment weighing all the circumstances.[22] The Commission specifically rejected attributing any controlling influence to the market, stating "that the past relationships between the market price of the warrant and the common stock should not be controlling in fixing the relative participations to be accorded as between the common stock and the warrants," in view of its inference that the past market for the warrants reflected in substantial part "the greater speculative possibility provided by like amounts of capital if used to purchase warrants than like amounts of stock."[23] In

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[22] The Commission did summarize in its opinion a study made by one of the witnesses as to certain relationships between the price of the warrants and the stock, from which it appeared that the perpetual call feature of the warrants reached its highest valuation in the market at times when the stock sold immediately below the exercise price. If this opinion can be interpreted as attributing any significance at all to the market history it would appear to be merely by way of confirmation of the Commission's independent judgment that a call on stock, at a price somewhere near its apparent current value, is itself a privilege of substantial value, although necessarily difficult to measure.

[23] The court below which had previously upheld the Commission's decision in the *Electric Power and Light* case referred in the instant case to the above quotation from the Commission opinion in the earlier case and stated: "That may

the instant case, the Commission concluded that the warrants had no foreseeable exercise value, that it regarded any value which the market might have attributed to them in the absence of a plan, as representing exclusively that type of speculative element which it eliminated from consideration in the *Electric* case.[24] We believe the chief significance of the *Electric* case is that the Commission does give full recognition to the "perpetual call" feature of a warrant, and does make a substantial allowance for the possibility that the future value of the stock, upon which the warrant holder has an option, may be worth more than the particular amount which reflects the application of a fair discount rate to the Commission's best estimate of future earnings. In the instant case, however, the application of this technique failed to indicate any affirmative value for the warrants.

3. Respondent argued below that a strong probability of the common stock of Niagara acquiring

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well be true, and the Commission was of course free to use it as a factor in its appraisal of the 'warrants' at bar, although it is indeed a nebulous factor" (R. 125).

[24] Respondent did not urge below that the Commission had failed to consider the market history and indeed his entire argument was built upon the summary of that history contained in the Commission's findings. As the Court of Appeals for the Third Circuit noted in the *Commonwealth & Southern* case, the complaint was merely that the Commission refused to attribute significance to the market value in view of its conclusions drawn from analysis of earning power, 184 F. 2d 81, 85.

a future value equal to or in excess of the exercise price could be inferred from the great percentage increase in the market value of the stock since its low in 1942, urging that with the stock selling as of the time of the argument below at 16, that represented an increase of 18 times from its low of ⅞, and that only about a 200 percent further increase was necessary to bring it to the warrant exercise price of $42.86 a share. Apart from the superficial plausibility of this type of reasoning, we believe its fallacy is readily demonstrable when reference is made to the financial history of Niagara Hudson from 1942 to the date of the plan. In 1942 the common stock of Niagara Hudson shared the disfavor generally applicable to holding company shares. As a "leverage" security it reflected in exaggerated degree the unfavorable impact of the advent of a war economy and higher taxes upon equity securities of public utility companies. Except for a small dividend in 1940, no dividends had been paid on its common stock since 1938 (R. 87). Preferred dividends were suspended in 1942 because of problems incident to the enforced write down of the assets of operating subsidiaries, and the necessity of an accounting reorganization to permit distribution of current earnings. Since that date the difficulties of Niagara, which may well have been given a distorted interpretation by those who sold its common stock at close to nomi-

nal prices, have been largely eliminated. Accounting reorganizations have removed blocks to the distribution of earnings, dividend arrears on the preferred stock have been paid recently, the operating companies have been refinanced on a relatively low cost basis, many corporate entities have been eliminated and the system generally simplified. (R. 53-54, 58-59, 75-76). The present plan provides for receipt by the Niagara Hudson common stockholders, upon dissolution, of common stock of a soundly financed operating company. Obviously, current market prices of Niagara Hudson reflect these substantial improvements. The adoption by the Commission of approximately $1.39 per share as reasonably foreseeable earnings was based upon a consideration of all these facts, including the impact of rate regulation (R. 63-65, 69, 70-71).

The remoteness of the possibility that Niagara's income applicable to its common stock would greatly exceed the Commission's forecast is underlined by the fact that the former leverage characteristics of the Niagara Hudson stock had been greatly reduced and the Commission's forecast of earnings from public utility operations reflect a rate of return equal to, if not exceeding, the maximum which the rate regulatory authority was likely to permit (R. 71). Thus, the Commission's forecast works out as a return of 6.53% upon the indicated rate base (R. 70-73). The Securities and Exchange Commission, while reluctant to an-

ticipate the action of a state regulatory body, was able to point to intimations of the New York Public Service Commission that it believed there was a basis for rate reductions in a "cursory study of the income statements" of the Niagara Hudson's subsidiaries, while recent decisions of that commission in rate cases involving other companies had not permitted rates of return in excess of 6% on the rate base (R. 70).[25] The Commission's refusal to assume, as a basis for according a participation to the warrant holders, a reasonable possibility of future earnings per share exceeding its own forecast by as much as 100% was buttressed by the fact that this would involve a return equal approximately to 10% on the indicated present rate base.

In the light of the foregoing analysis, it does not follow that merely because Niagara Hudson common stock increased by 15⅛ over the 1942 low of ⅞, an increase of over 1700%, it is reasonable to expect an increment of about 200% over the recent price of 16. Even if it were assumed, *arguendo*, that over the years the price of Niagara Hudson common stock would rise by an additional $15, such a change would represent an increase of less than 100% and would be far short of the exercise price of $42.86 per share.

The court below did not accept respondent's invitation to prophesy a future increase of over 200%

[25] *Long Island Lighting Co.*, 18 P. U. R. (N. S.) 65, 212, 213 (1935) (6%); *Staten Island Edison Corp.*, 60 P. U. R. (N. S.) 385, 488 (1945) (5½%); *Orange & Rockland Electric Co.*, 49 P. U. R. (N. S.) 257, 318-319 (1943) (5½%).

in Niagara Hudson's common stock. Nevertheless, there is intimation in the opinion that it did not consider the prospect of such an increase so negligible as to support the denial of any participation at all by the Commission. Thus the opinion states (R. 125-126):

> Besides, it must be remembered that the finding that the "warrants" at bar had no value whatever was just as much of a guess, as a finding that they had some particular value. We are forced to deal in prophecies in any event; and, unless courts are to have no review at all, they cannot avoid acting upon such impalpable ingredients. Clearly there can be appraisals which no "substantial evidence" supports; and one guess is not as good as another, unless all findings of the Commission are to be final.

Whether the market history of the warrants be regarded as strong or weak evidence of their intrinsic value or whether past percentage increases in the value of Niagara Hudson's common stock do or do not support an inference of probable future increase by over 200%, we believe it clear that it was the Commission's function to determine the weight to be accorded such evidence as compared to evidence concerning foreseeable earnings. See *SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 126. The basis for administrative finality in this area rests not alone upon the

Congressional intention to rely upon a specialized administrative agency, rather than a reviewing court, to make the "guess" as to the future, but in the desire of the Congress for reasonably uniform and expeditious determination of matters not susceptible of exact proof. *Cf. SEC* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 124.

Apparently, the court below was not prepared to rule that, as a matter of law, the evidence indicated some minimum value for the warrants. Such a ruling, however contrary to our conception of the requirements of the substantial evidence rule, would at least permit a reasonably expeditious resolution of the controversy. But in holding merely that the Commission could not find the warrants worthless, while disclaiming any intention of indicating what their value might be, or of promulgating a standard by which the Commission should determine their value, the opinion below holds forth only the prospect of a long process of repeated trial and error before there can be a concurrence between the administrative and judicial "guess" as to the value of the warrants.

However, the main thrust of the opinion below, does not appear to us to rest upon a substitution of the Court's guess that the warrants had some value, for the Commission's guess that they had no intrinsic value. Instead, it appears that the Court was driven to reliance upon the market history because of its interpretation of the *Otis* case as requiring that warrant holders be compensated at

the expense of common stockholders for deprivation of a mere gambler's chance of participating in an unpredictable future appreciation in value. As we have argued in Point I, *supra*, this is a misinterpretation of the *Otis* case and contravenes the long line of authorities which uphold the rule of strict priority.

CONCLUSION

The judgment of the Court below should be reversed. The order of the District Court, which denies any participation to the class B stock options warrants, should be affirmed.

Respectfully submitted,

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NOVEMBER 1950.

☆ U.S. GOVERNMENT PRINTING OFFICE 1950—914673/P.O. 300

NIAGARA HUDSON POWER CORPORATION

RELATIONSHIP OF MARKET PRICES OF COMMON STOCK AND $3\frac{1}{2}$ WARRANTS
AT CLOSE OF EACH QUARTER YEAR, 1937-1947